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A Clear, Concise Statement of American Law and Practice, Written by Resident Law School Professors and Law Writers of Authoritative Standing

VOLUME 1

INTRODUCTION

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CONTENTS

PREFATORY NOTE..... i

INTRODUCTION.

CHAPTER I.

Law: Its Meaning, Sources, and Classification.

SECTION 1.

What is Law?

§ 1. Varying uses of the word "law".....v
§ 2. Laws of God.....vi
§ 3. Moral laws.....vi
§ 4. Laws of nature.....vi
§ 5. Laws of logic and esthetics.....vii
§ 6. Economic laws.....viii
§ 7. Law as a rule of human conduct enforced by the state....ix
§ 8. Suggested qualifications of this.....ix

SECTION 2.

Sources of Law.

§ 9. Custom x
§ 10. Same: Illustrations.....xi
§ 11. Adjudication as a source of law.....xii
§ 12. Legislation as a source of law.....xiii

SECTION 3.

Classification of Law.

§ 13. Analytical classifications.....xiv
§ 14. Practical classifications.....xv
§ 15. The common law.....xvi

CHAPTER II.

Outline of English Legal History.

§ 16. Roman and English law. Scope of chapter.....xviii

SECTION 1.

Early influences affecting English Law.

§ 17. Britains and Romans.....xix
§ 18. Anglo-Saxons and Danes.....xx
§ 19. The Normans.....xxi

CONTENTS

SECTION 2.

Development of English Law from Henry II to American Independence.

§ 20. Early modes of trial xxii
§ 21. Trial by jury xxii
§ 22. Legal reforms of Henry II xxiv
§ 23. Magna Charta xxv
§ 24. Legislation of Edward I xxvi
§ 25. Legislation of Henry VIII xxviii
§ 26. The Stuart period xxix
§ 27. The eighteenth century xxx
§ 28. Growth of judge-made law xxx

SECTION 3.

Courts of Equity.

§ 29. Original theory of king's courts xxxi
§ 30. Early development of court of chancery xxxii
§ 31. Contest between chancery and common law courts xxxiii
§ 32. Development of equity jurisdiction xxxiv
§ 33. Function of equity xxxv

SECTION 4.

Other English Legal Systems.

§ 34. Admiralty law. Canon law. Law merchant xxxvii

SECTION 5.

Classical Legal Literature.

§ 35. Early legal literature: Glanville and Bracton xxxviii
§ 36. Same: Year Books. Littleton's Tenures xxxix
§ 37. Lord Coke xl
§ 38. Blackstone xli

CHAPTER III.

Use of Judicial Precedents.

§ 39. Occasion and mode of judicial law-making xlii
§ 40. Same: Illustration xliii
§ 41. Judicial precedents ordinarily followed xlv
§ 42. How far decisions create precedents. Illustrations xlvi
§ 43. Same: Conclusion xlviii
§ 44. Same: Several questions in a case xlviii
§ 45. Same: Dicta xlix
§ 46. When precedents may be overruled xlix
§ 47. Precedents from other jurisdictions l
§ 48. How precedents are collected and cited li
§ 49. Statutes liii

CONTENTS

CONTRACTS.

CHAPTER I.

Preliminary Topics.

SECTION 1.

Classification of Rights.

§ 1. Absolute and relative rights..... 1
§ 2. Classification of relative rights..... 2

SECTION 2.

Historical Development of Contracts.

§ 3. Primitive law..... 3

SECTION 3.

Classification of Contracts.

§ 4. Contracts and quasi-contracts..... 4
§ 5. Formal and informal contracts..... 4
§ 6. Express and implied contracts..... 5
§ 7. Executed or executory contracts..... 5
§ 8. Bilateral and unilateral contracts..... 6

PART I.

FORMATION OF CONTRACTS.

CHAPTER II.

Offer and Acceptance.

§ 9. Contract defined..... 7
§ 10. Agreement must contain a promise..... 7
§ 11. Promise must be enforceable in law..... 8
§ 12. Motive is not material..... 8
§ 13. Meeting of minds..... 9
§ 14. When a knowledge of terms of offer is presumed..... 11
§ 15. Actual meeting of minds not required..... 12
§ 16. Offer must be communicated..... 12
§ 17. Where the contract arises..... 13

CONTENTS

§ 18. Acceptance must be communicated 15
§ 19. Mere silence not an acceptance 15
§ 20. When actual receipt of acceptance is neccessary 16
§ 21. Acceptance must be responsive to offer 17
§ 22. Notice of acceptance. Unilateral contracts 18
§ 23. By whom offer must be accepted 19
§ 24. Certainty of terms: Advertisements as offers 19
§ 25. When advertisement is an offer 20
§ 26. Clear evidence of intent to make an offer is required 21
§ 27. Binding force of agreement preliminary to formal contract 22
§ 28. Acceptance must be in the terms of the offer 23
§ 29. Effect of counter offer 24
§ 30. Revocation of the offer 24
§ 31. Revocation where offer is to remain open for a definite time. 25
§ 32. Options 26
§ 33. Revocation of offers to public 26
§ 34. When revocation is communicated 26
§ 35. Termination by lapse of time 27
§ 36. Period of offer determined by the subject matter 28
§ 37. Answer by return mail 29
§ 38. Effect of death 29
§ 39. Effect of insanity 30

CHAPTER III.

Consideration.

§ 40. Consideration 32
§ 41. Origin of doctrine 33
§ 42. Motive and consideration 34
§ 43. Adequacy of consideration 36
§ 44. Benefit to the promisor 37
§ 45. Illusory promises 37
§ 46. Consideration void in part 38
§ 47. Subscription contracts 39
§ 48. Composition with creditors 41
§ 49. Performing or promising to perform a contract obligation. 42
§ 50. Same: Apparent exceptions to the rule 44
§ 51. Promises to third persons 45
§ 52. Performance of a non-contract obligation 47
§ 53. Forbearance or compromise of a claim 48
§ 54. An actual claim must be presented 50
§ 55. Forbearance to sue 50

CONTENTS

§ 56. Past consideration 52
§ 57. Same: Apparent exception to the rule 53
§ 58. Moral consideration 55
§ 59. Same: Apparent exceptions to the rule 55
§ 60. Action on the original contract 57
§ 61. Original obligation void 57

CHAPTER IV.

Contracts under Seal. Parties.

§ 62. Definition 59
§ 63. Seal. Form and signature 59
§ 64. Delivery. Escrow 60
§ 65. Consideration 60
§ 66. Other modifications of the old rules 61
§ 67. Disabilities limiting contractual capacity 62
§ 68. Insane persons and idiots: English rule 62
§ 69. Same: American rule 63
§ 70. Where insanity is known 63
§ 71. When the contract is void 64
§ 72. Monomania and lucid intervals 64
§ 73. Drunkards 65
§ 74. Infants 66
§ 75. Married women 66
§ 76. Corporations 66

CHAPTER V.

Statute of Frauds.

§ 77. Policy of the statute 68
§ 78. Provisions of the statute 69
§ 79. Special promise by executor or administrator to pay out of his own estate 70
§ 80. Promise to answer for the debt, default or miscarriage of another 70
§ 81. Agreements in consideration of marriage 71
§ 82. Contracts for the sale of land, tenements, etc 71
§ 83. Agreements not to be performed within the space of a year 72
§ 84. Same: Performance contingent on an uncertain event 72
§ 85. Contracts for the sale of goods, wares and merchandise 74
§ 86. The memorandum 74

CONTENTS

PART II.

OPERATION OF CONTRACTS.

CHAPTER VI.

Joint and Several Contracts. Alternative Contracts.

§ 87. Joint or several liability 75
§ 88. Joint contracts 76
§ 89. Survivorship 76
§ 90. Joint and several obligations 76
§ 91. Contracts performable in the alternative 78

CHAPTER VII.

Rights and Liabilities of Third Persons.

SECTION 1.

Right of a Beneficiary under a Contract to Which He Is Not a Party.

§ 92. General doctrine. Lawrence v. Fox 81
§ 93. Must benefit to third person be intended? 82
§ 94. Mere incidental benefit insufficient 83
§ 95. Limitations upon Lawrence v. Fox in New York 84
§ 96. Rescission by the parties to the contract 84
§ 97. Defences to suit by third party 85
§ 98. Election of remedies 85
§ 99. Real party in interest 86
§100. Proper basis of the rule 86

SECTION 2.

Assignment of Contracts.

§101. General doctrine 87
§102. Suit in name of assignor 87
§103. What claims are assignable 88
§104. Same: Personal service 89
§105. Same: Future interests 90
§106. Same: Contracts non-assignable in terms 90
§107. Same: Public policy 90
§108. Prerequisites of a valid assignment 91
§109. Notice to the debtor 91
§110. Successive assignments 92
§111. Partial assignments 92
§112. Negotiable contracts 93
§113. Assignments by operation of law 94
§114. Rights of the assignee 94

CONTENTS

CHAPTER VIII.

Interpretation and Construction of Contracts.

§115. Scope of subject..... 96
§116. Problem of interpretation..... 96
§117. Rules of interpretation..... 97
§118. Oral contracts..... 97
§119. Written contracts..... 97
§120. Parol evidence rule..... 97
§121. Dependent or independent promises..... 98
§122. Independent promises..... 99
§123. Dependent promises.....100
§124. Time for performance..... 100
§125. Where act on one side requires time.....101
§126. Where one act is to be done first.....101
§127. Test of mutual dependency.....102
§128. Contracts conditional on satisfaction.....102
§129. Notice of facts upon which performance depends.....103
§130. Implied conditions 104
§131. Where the consideration is not apportioned.....105
§132. Installment contracts.....106
§133. Same: Illustrations.....107
§134. When the right of action accrues. Anticipatory breach...109

CHAPTER IX.

Remedies for Breach of Contract.

§135. Available remedies.....112
§136. Money damages.....112
§137. Specific performance.....112
§138. Money damages: Details of the remedy.....113

PART III.

DISCHARGE OF CONTRACTS.

CHAPTER X.

Discharge by Act of the Parties.

SECTION 1.

Rescission.

§139. By mutual agreement.....114
§140. Dependent relative rescission.....115
§141. Rescission for a default under the contract.....115

CONTENTS

SECTION 2.

Release.

§142. Release 115
§143. Covenant not to sue as a release 115

SECTION 3.

Accord and Satisfaction.

§144. Accord and satisfaction: Unilateral 116
§145. Same: Bilateral 116
§146. Equitable relief 117
§147. Conditional satisfaction 117
§148. Instruments under seal 117
§149. Accord and satisfaction by implication 118

SECTION 4.

Novation.

§150. Definition 118
§151. Substitution of parties 119
§152. Substitution of creditors 120

CHAPTER XI.

Illegality.

§153. Illegal contracts 122
§154. Gaming contracts 123
§155. Commercial wagers 123
§156. Insurance contracts as wagers 124
§157. Furtherance of illegal purpose 124
§158. Agreements in restraint of trade 125
§159. Valid restraints: Trade secrets 125
§160. Same: Good will 125
§161. Statutory prohibitions 127
§162. Rule in the absence of statute 127
§163. Agreements tending to defeat the administration of justice: Stifling prosecution 128
§164. Same: Exceptions to above rule 128
§165. Same: Champerty 129
§166. Same: Maintenance 129
§167. Agreement to influence public officials 130
§168. Restraint of marriage 131
§169. Contracts to defraud third persons 131
§170. Sunday contracts 132
§171. The effect of illegality 132
§172. Where the contract is divisible 132

CONTENTS

§173. Where the act is highly immoral....133
§174. Acts forbidden or penalized by statute....134
§175. Intention of parties immaterial....134
§176. Right of innocent party....135
§177. Negotiable paper given for illegal purposes....135
§178. Parties not in equal fault....136
§179. Where the illegal purpose is not consummated....137
§180. Recovery from a stakeholder....137
§181. Conflict of laws....138

CHAPTER XII.

Impossibility.

§182. Risk of loss....139
§183. Absolute impossibility....139
§184. Impossibility known to one party only....139
§185. Subsequent impossibility....140
§186. Acts of God....141
§187. Impossibility known to delinquent party....142
§188. Contract dependent on the existence of a particular thing.143
§189. Acts of law....144
§190. Acts of war....146
§191. Increased expense....146
§192. Alternative contracts....147
§193. Impossibility occasioned by act of the party....147
§194. Rights of parties where contract can not be performed on account of impossibility....147

CHAPTER XIII.

Mistake.

§195. Mutual mistake....150
§196. Mistake by one party....151
§197. Mistake as to identity of a party....151
§198. Mistake known to the other party....151
§199. Mistake as to form....152

CHAPTER XIV.

Improper Conduct Inducing the Contract.

§200. Non-disclosure of facts....153
§201. Affirmative misrepresentations....154
§202. Distinction between effect of misrepresentation and of fraud....155
§203. What is a false statement?....155

§204. Statements of law....156
§205. Effect of fraud....157
§206. Undue influence and duress: In general....157
§207. Undue influence: Special cases....158
§208. Effect of undue influence and duress....158

QUASI-CONTRACTS.

CHAPTER I.

The Nature of Quasi-Contractual Obligations.

§ 1. Historical connection of quasi-contract with forms of pleading....160
§ 2. Its extension by Lord Mansfield....162
§ 3. Quasi-contracts distinguished from true contracts....163
§ 4. Definition of quasi-contract....165
§ 5. A record gives rise to a quasi-contract....165
§ 6. A statutory duty may give rise to a quasi-contract....166
§ 7. An official duty may give rise to a quasi-contract....167
§ 8. Unjust enrichment the basis of most quasi-contracts....167

CHAPTER II.

Waiver of Tort.

§ 9. Meaning of "waiving the tort."....169
§ 10. Conversion and sale. Measure of recovery is amount received....171
§ 11. The quasi-contract arises when the money is received. Statute of limitations....172
§ 12. Money or its equivalent must be received....173
§ 13. Conversion and no sale: May tort be waived?....175
§ 14. Same: Illustrations....176
§ 15. Same: Conclusion....177
§ 16. Recovery in quasi-contract for use of personal property....178
§ 17. Same: Illustrations....179
§ 18. Recovery for use of real property....180
§ 19. Same: Measure of recovery....182
§ 20. Recovery of fees or salary of public office....183
§ 21. Recovery for services illegally obtained....184
§ 22. Recovery for services of apprentice enticed away....185
§ 23. Recovery for benefits conferred under invalid marriage....186
§ 24. Right to recover benefits conferred under sale rescinded for fraud....187
§ 25. Election of remedies....189

CONTENTS

CHAPTER III.

Recovery for Benefits Conferred without a Contract.

SECTION 1.

Recovery of Money Paid under Compulsion.

§ 26. No recovery if parties are "in pari delicto."....191
§ 27. Transaction illegal on account of statute for protection of plaintiff....192
§ 28. Money paid under duress of goods....193
§ 29. Money paid under compulsion of legal process....195
§ 30. Money paid under a judgment....197
§ 31. Money paid to prevent illegal seizure for taxes....198
§ 32. Money paid in discharge of a duty....199
§ 33. Contribution between joint wrong-doers....201
§ 34. Same: Where recovery is allowed....201
§ 35. Contribution between co-contractors....203

SECTION 2.

Recovery for Benefits Conferred without Request.

§ 36. Where plaintiff intends to benefit defendant....204
§ 37. Same: Saving property....205
§ 38. Benefits conferred at request of third party....206
§ 39. Improvements made in good faith upon another's land....207
§ 40. Recovery for services rendered by a supposed slave....208

CHAPTER IV.

Recovery for Benefits Conferred under a Contract.

SECTION 1.

Benefits Conferred under a Mistake of Law.

§ 41. Distinction between law and fact....210
§ 42. Mistakes of law....210

SECTION 2.

Benefits Conferred under a Mistake of Fact.

§ 43. Mistake of fact as to existence of contract....212
§ 44. Mistake as to the subject matter of the contract....213
§ 45. Mistake as to the title of seller: Personal property....214
§ 46. Same: Real property....215

SECTION 3.

Plaintiff in Default under a Contract.

§ 47. Wilful default....216
§ 48. Inexcusable but not wilful default....217
§ 49. Performance impossible....217

§ 50. Plaintiff to plead the statute of frauds.....219
§ 51. Performance illegal.....220

SECTION 4.

Defendant in Default under a Contract.

§ 52. Defendant wilfully or inexcusably in default.....221
§ 53. Performance impossible.....223
§ 54. Defendant able to plead the statute of frauds.....224
§ 55. Performance illegal.....225

CHAPTER V.

Quasi-Contractual Obligations in the Law of Persons.

§ 56. Liability of infant for necessaries.....227
§ 57. Liability of insane person for necessaries.....227
§ 58. Liability of husband for wife's necessaries.....228
§ 59. Liability of father for necessaries furnished child.....229

AGENCY.

CHAPTER I.

Fundamental Conceptions.

§ 1. The function of agency.....230
§ 2. Agent and servant: Definitions.....231
§ 3. Responsibility for the agent's act.....231
§ 4. Personal character of the relation.....232
§ 5. Purposes for which an agency may be created.....232
§ 6. The parties involved in the relation.....233

PART I.

THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

CHAPTER II.

The Formation of the Relation.

SECTION 1.

Competency of the Parties.

§ 7. Capacity to act as principal.....235
§ 8. Same: Infants as principals.....235
§ 9. Same: Married women.....236
§ 10. Same: Insane persons.....236
§ 11. Same: Corporations.....237
§ 12. Same: Partnerships.....237
§ 13. Same: Unincorporated associations.....237

CONTENTS

§ 14. Capacity to act as agent....238

SECTION 2.

Formation of the Relation by Prior Agreement.

§ 15. Essentials of the relation....238
§ 16. Implied assent....239
§ 17. Gratuitous agency....240

SECTION 3.

Formation of the Relation by Ratification.

§ 18. Ratification: Definition....240
§ 19. Ratification is equivalent to prior authorization....241
§ 20. Ratification is irrevocable....242
§ 21. Conditions of valid ratification....242
§ 22. Act must be performed for existing principal....242
§ 23. Act must be done on behalf of a principal disclosed to third party....243
§ 24. The principal must be competent to do the act....244
§ 25. Intervening rights of strangers must be respected....245
§ 26. Intervening rights of third parties must be respected....245
§ 27. Transaction cannot be ratified in part only....246
§ 28. Ratification must be with full knowledge of fact....247
§ 29. Ratification may be expressed or implied....248

SECTION 4.

Formation of Quasi-Agencies by Operation of Law.

§ 30. In general....249
§ 31. Agency by estoppel....250
§ 32. Agency by necessity....250

SECTION 5.

Form of Appointment.

§ 33. In general parol appointment sufficient....251
§ 34. Exceptions: Statutes: Sealed instruments....251

CHAPTER III.

Termination of the Relation.

§ 35. In general....253
§ 36. Termination by consent of principal and agent....253
§ 37. Revocation by the principal....254
§ 38. Rights of the agent on revocation....255
§ 39. When revocation is justified....255
§ 40. What constitutes a revocation....256
§ 41. Necessity of notice of revocation....256
§ 42. Renunciation by the agent....258

§ 43. Termination by operation of law: Change in the subject matter 259
§ 44. Same: Death of a party or dissolution of a corporation or partnership 259
§ 45. Same: Various changes of condition of one of the parties.. 261
§ 46. Irrevocable agencies: Powers granted for the protection of the agent 261
§ 47. Same: Powers coupled with an interest 262

CHAPTER IV.

Obligations of Principal to Agent.

SECTION 1.

Obligation to Recompense.

§ 48. Compensation 264
§ 49. Reimbursement 265
§ 50. Indemnity 266

SECTION 2.

Obligation to Protect.

§ 51. Protection from injury: In general 266
§ 52. Classification of duties 267
§ 53. Duty to provide a safe place to work 267
§ 54. Duty to provide and maintain safe appliances and machinery 268
§ 55. Duty to inspect and repair 269
§ 56. Duty to provide a sufficient force of competent fellow servants 271
§ 57. Duty as to rules 271
§ 58. Duty as to special orders, etc 272
§ 59. The servant's right to rely upon performance by the master 273
§ 60. Character of these duties cannot be delegated 274
§ 61. Qualifications of the rule: In general 274
§ 62. Same: Voluntary assumption of the risk by the servant.. 274
§ 63. Same: What assumption is involuntary 276
§ 64. Same: Contributory negligence of the servant 277

SECTION 3.

Exception to Obligation to Protect: Fellow Servant Rule.

§ 65. The nature of the fellow servant rule 277
§ 66. Limitations on the fellow servant rule: Master liable if participating in the injury 279
§ 67. Same: Master liable for a vice-principal's wrong 279

§ 68. The superior servant doctrine.....280
§ 69. The different department doctrine.....281
§ 70. Who are fellow servants: In general.....282
§ 71. Same: Servants having a common master.....282
§ 72. Same: Servants having a common employment.....284
§ 73. Statutory modifications of the fellow servant rule.....284

CHAPTER V.

Obligations of Agent to Principal

§ 74. The duty of obedience.....286
§ 75. Same: Gratuitous agents.....286
§ 76. Same: Exceptions.....287
§ 77. Loyalty.....288
§ 78. Same: Agent cannot make personal profit out of his transactions.....288
§ 79. Same: Agent cannot represent both parties.....289
§ 80. Care, skill, and diligence: Paid agent.....290
§ 81. Same: Gratuitous agent.....291
§ 82. Accounting.....291
§ 83. Communication.....291
§ 84. Personal discharge of his functions as agent.....292
§ 85. Same: Ministerial acts.....293
§ 86. Same: Delegation customary in the particular business....293
§ 87. Consequences of a permitted delegation.....294

PART II.

THE RELATION AS BETWEEN PRINCIPAL AND THIRD PARTY.

CHAPTER VI.

Principal's Responsibility for Torts of Agent.

§ 88. Reason for holding the principal responsible.....295
§ 89. Torts actually authorized.....296
§ 90. Torts necessarily or usually incident to an authorized course of action.....296
§ 91. Unauthorized torts committed in the course of the servant's employment and in the intended furtherance of the master's business.....297
§ 92. Same: Wilful acts.....298
§ 93. Same (continued).....300
§ 94. Same: Fraud.....300

CONTENTS

§ 95. Special liability of the master in cases of contract with a third party....301
§ 96. Same: Where the master has entrusted a dangerous instrumentality to the servant....302
§ 97. Same: Application of doctrine to frauds of agent....303
§ 98. Exception in case of public agencies....305
§ 99. Master not liable for acts of independent contractor....305
§100. Master not liable for torts of servant temporarily transferred to another master....306
§101. Master not liable for torts of an interloper....307

CHAPTER VII.

Principal's Responsibility for Crimes of Agent.

§102. Civil liability....308
§103. Criminal liability: In general liable only for authorized acts....308
§104. Same: Exceptions....309

CHAPTER VIII.

Principal's Responsibility for Contracts Made on His Behalf by Agent.

§105. Division of subject....310

SECTION 1.

Contracts Made for a Disclosed Principal.

§106. General rule....310
§107. Extent of agent's authority....310
§108. Authority actually conferred binds the principal....311
§109. Forms of conferring express authority and their construction....311
§110. Incidental authority: In general....312
§111. Same: Where the principal instructs against the use of incidental authority....314
§112. Same: Illustrations of authority incident to the nature of the agency....314
§113. Same: Agents to sell....315
§114. Same: Agents to purchase....315
§115. Same: Agents to manage a business or property....316
§116. Same: Factors....316
§117. Same: Brokers....318
§118. Same: Auctioneers....319
§119. Same: Attorneys at Law....320
§120. Authority by estoppel....321

CONTENTS

§121. Same: Distinguished from incidental authority.....321
§122. Limits of principal's liability.....322
§123. Exceptions to the rule of principal's liability.....323

SECTION 2.

Contracts Made on Behalf of an Undisclosed Principal.

§124. In general.....324
§125. Liability of undisclosed principal for contracts made by his agent.....324
§126. Exceptions to liability of undisclosed principal: Written contracts.....326
§127. Same: State of accounts between principal and agent....327
§128. Same: Third party's election.....328

CHAPTER IX.

Principal's Responsibility for Statements and Knowledge of Agent.

§129. In general.....330
§130. Agent's statements as to the fact of agency.....331
§131. Agent's statements as a part of the transaction.....331
§132. Notice to the agent is notice to the principal.....332
§133. Same: Limitations of rule.....333
§134. Notice must be received in the course of the agency.....334
§135. Notice to an agent adversely interested is not notice to the principal.....335
§136. Notice to agents of corporations.....336
§137. Notice to sub-agents.....336

CHAPTER X.

Principal's Rights Against Third Parties.

§138. In general.....338
§139. Rights of principal against third party in tort.....338
§140. Same: Exceptions.....339
§141. Same (continued).....340
§142. Rights of principal against third party in quasi-contract..341
§143. Rights of disclosed principal against third party in contract.....341
§144. Same: Rights of undisclosed principal against third party in contract.....342
§145. Same: In general principal can recover.....342
§146. Exceptions to rule: State of accounts between agent and third party.....343

§147. Same: Negotiable paper and sealed instrument.....334
§148. Same: Where agent has expressly represented himself as principal in a written instrument.....344
§149. Same: Where personal reliance is placed in agent.....344
§150. Liability of the third party to the principal in equity.....345

PART III.

THE RELATION AS BETWEEN AGENT AND THIRD PARTY.

CHAPTER XI.

Agent's Liability to Third Party.

SECTION 1.

Torts.

§151. In general agent is liable for torts.....346
§152. No liability for non-performance of duty owed solely to principal 346
§153. Liability for performance of duty to principal injurious to third party.....347

SECTION 2.

Contracts for Disclosed Principal.

§154. Agent generally not liable.....349
§155. Written contracts not under seal.....349
§156. Sealed and negotiable instruments.....350
§157. Liability for unauthorized contracts.....351
§158. Liability for contracts made on behalf of a non-existent or incompetent principal.....353

SECTION 3.

Contracts for Undisclosed Principal.

§159. Agent is liable on contracts for undisclosed principal.....354
§160. Agent's liability in quasi-contract.....355

CHAPTER XII.

Third Party's Liability to Agent.

§161. In tort.....357
§162. In contract: In general.....358
§163. Agent alone can sue on sealed or negotiable instrument made in agent's name.....358
§164. Agent as well as principal may sue when principal is undisclosed 359
§165. Agent as well as principal may sue on a written simple contract made in agent's name.....360

CONTENTS

§166. Agent may sue in his own behalf where he has a special property 360
§167. Agent may sue in quasi-contract in cases of mistake, etc. .361
Appendix A. Contracts 363
Appendix B. Quasi-contracts 371
Appendix C. Agency 373

PREFATORY NOTE.

This work has been prepared for the purpose of giving a brief but accurate account of the principal doctrines of American law, in such form that they may be readily comprehensible, not only to lawyers, but to intelligent readers without technical legal training.

Sir William Blackstone, the first English professor of law, in his opening lecture at Oxford in 1758, conceived that a competent knowledge of the laws of the society in which he lived was a proper accomplishment for every gentleman and scholar, and a highly useful part of a liberal education. Mr. Justice James Wilson, of the United States Supreme Court, who delivered the first regular course of law lectures in America at the University of Pennsylvania in 1790, said:

"The science of law should, in some measure, and in some degree be the study of every free citizen and of every free man. Every free citizen and every free man has duties to perform and rights to claim. Unless in some measure and in some degree he knows those duties and those rights, he can never act a just and independent part. . . . Happily the general and most important principles of law are not removed to a very great distance from common apprehension. . . . As a science, the law is far from being so disagreeable or so perplexing a study as it is frequently supposed to be. Some, indeed, involve themselves in a thick mist of terms of art, and use a language unknown to all but those of the profession. By such, the knowledge of the law, like the mysteries of

some ancient divinity, is confined to its initiated votaries. This ought not to be the case. The knowledge of these rational principles on which the law is founded ought, especially in a free government, to be diffused over the whole community."

A knowledge of legal principles is not less useful or interesting today than it was in the eighteenth century, though it is considerably more difficult to obtain than it was just after the publication of Blackstone's Commentaries. Perhaps more than at any time since the formative days of the Republic, the people are now seeking to understand the principles of law and government under which they live, and to take an intelligent part in administering or improving them. The special difficulties in the way of this are due to the enormous expansion of human activity progressively going on, and to the character of our law, largely founded as it is upon judicial precedents. It is not possible really to understand any considerable principle of American or English law, without tracing its history back through a succession of cases, in which courts have actually applied, explained, limited, modified, or enlarged the legal doctrine, and thus wrought it into the form it now bears. The application of principles thus evolved to the complexities of modern life has resulted in a mass of law, too unwieldy to be adequately studied from its sources and explained in its entirety by any one person, any more than an encyclopedia of medicine could be well written by a single physician in the present state of medical knowledge. The accurate statement of the principles of law actually in operation over the wide field of

twentieth century activity is thus necessarily a matter for specialists.

For the purpose of popular presentation, however, it is not enough that a writer be a specialist upon a legal topic, but he must be able to seize its cardinal points and present them clearly and forcibly, with the proper amount of concrete illustration, and without cumbering detail. No men as a class are so likely to do this well as professional teachers in university schools of law, who are constantly engaged in analyzing and classifying this immense mass of legal material, and in arranging it for presentation to students in the most orderly and forcible manner. By profession such men are legal specialists with a talent for lucid explanation, and their services have been chiefly enlisted in the preparation of this work. All of the articles are written by men who have devoted special study to the topics they have undertaken, and most of the writers are professional teachers of law in our larger university schools.

The method of treatment employed, within the limits of space permissible, has been to discuss the development and application of the more important principles of our law by illustrations drawn from leading cases that have arisen in actual litigation. Under our system of law-making by judicial precedent, these cases are constantly cited and relied upon by the courts as authority for the legal principles enunciated in them, and this method of dealing with law at first hand has a freshness and interest quite foreign to the mere enumeration of dry-as-dust abstractions, labeled rules of law. By omitting de-

tails, by passing over unimportant topics with brief mention, by a careful system of cross-references to avoid duplication of matter in articles upon related subjects, and by an earnest effort to secure due proportion in the treatment of the various subjects, it has been possible in a modest compass to give a really clear, accurate, and readable statement of the legal principles actually applied by the courts of this country in all of the more important branches of the law.

Sufficient explanation has been given of various technical matters in the introductory volume, in the glossary, and in connection with each special topic, so that all of the articles may be understood by the intelligent reader, without professional guidance, provided that the elements of fundamental topics, like Contracts, Agency, Torts, and Real Property, be mastered before advanced subjects, founded on them, be undertaken. At the close of each volume have been placed a number of simple concrete problems, designed to enable the reader to test his comprehension of what he has read. The discussion of principles in the text appropriate to each problem is indicated by the section number prefixed to the problem.

The editorship of this work has been divided between James P. Hall and James D. Andrews. Volumes I, II, III, IV, V, VI, VII (except the article on Banking), VIII, IX, X, XI and XII have been prepared under the supervision of Mr. Hall. Volume XIII, the article on Banking in Volume VII, and all of Volume XIV, except the index and glossary, are the work of Mr. Andrews.

INTRODUCTION

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CHAPTER I.

LAW: ITS MEANING, SOURCES, AND CLASSIFICATION.

SECTION 1. WHAT IS LAW?

§ 1. Varying uses of the word "law." What is law? We speak of the laws of God, the moral law, the laws of nature, the laws of logic and esthetics, the laws of political economy, and the like, as well as the laws of Illinois and New York. Just what is meant by "law" in each of these phrases?

§ 2. **Laws of God.** "Thou shalt have no other gods before me" is a rule that may be believed to be imposed upon mankind by God as a divine Ruler. It is a command from a source entitled to obedience, and imposes a compulsive obligation upon all believers—a compulsion, however, that derives its ultimate force from fear of the consequences of divine displeasure, if it is disobeyed, rather than from human sanctions. In some societies, and doubtless in the early stages of all societies, the violation of commands believed to be divine may regularly receive human punishment, and at later periods obedience may be practically coerced by the force of public opinion, but these are merely additional sanctions not necessarily involved in the notion of a law of God.

§ 3. **Moral laws.** "Thou shalt not covet thy neighbor's goods" may likewise be believed to be a law of God, but it may also be recognized as having a moral obligation by persons indisposed to admit its divine authority. The compulsive force of this moral obligation is public or class opinion, or even the dictates of the individual conscience, either or all of which may in particular instances exercise a stronger influence over men's actions than the commands of the legislature. These moral obligations may vary from those of the most sacred and solemn character to those of the most petty nature, though the latter are more likely to be spoken of as laws of fashion or of etiquette. The sanction of them all is to be found in public or individual sentiment.

§ 4. **Laws of nature.** That a solid body left free above the earth's surface will fall toward it with a certain

regularly increasing velocity (qualified by the friction of the air) is called a "law of nature." Many such interesting and useful "laws" have been discovered, and more are being constantly brought to light as nature is interrogated by tireless experimenters. From the scientific point of view there is nothing in all this corresponding to the notion of obligation on the part of bodies to gravitate toward each other, or of external compulsion of them to do so. The so-called "law" here simply means that certain facts regularly accompany or follow certain other facts. Whether this is on account of some never-failing external compulsion, or is due to inherent qualities of matter, or to some other reason, is a subject for philosophical speculation which is in nowise involved in the statement of the "law." Moreover, if compulsion there be, the objects compelled, so far as they consist of non-sentient matter, are not supposed to have any possible choice about yielding to the compulsion. The observed results of a natural "law" seem to flow inevitably and mechanically from appropriate antecedent conditions.

§ 5. **Laws of logic and esthetics.** Special instances of natural law are the so-called laws of logic or laws of thought. All sane persons at once recognize the necessary truth of the proposition, "Things identical with the same thing are identical with each other." Just as the nature of our consciousness compels us to think of things as existing in space and of events as occurring in time, so there is a certain uniformity in the mode of reasoning of all sane minds as regards at least the simpler deductions from given premises. Here again the only com-

pulsion that exists is inherent in the nature of reasoning consciousness, and there is no alternative of disobedience open to us. By no effort of the will or of the intellect can we convince ourselves that things equal to the same thing are not equal to each other.

In a multitude of phrases, such as laws of beauty, laws of art, laws of the drama, laws of architecture, and so forth, the word is used to indicate a rather indefinite body of conventions of taste approved more or less generally by persons familiar with these fields of effort. Doubtless the more important of these conventions are frequently conceived to commend themselves so generally to minds trained in these special matters as to correspond to something innate in artistic consciousness. In so far as this is true they may perhaps be tentatively classified with the natural laws of the mind.

§ 6. **Economic laws.** "Men buy in the cheapest market and sell in the dearest" is a classical law of political economy, and one of the fundamental assumptions upon which rests much of the reasoning in that subject. Doubtless it is so generally true that it may readily come to be regarded as a natural law akin to those of gravitation and of thought. One important difference suggests itself, however. Men buy in the cheapest market only because they choose to do so. They are free to act differently and violate no obligations human or divine in doing so. The so-called law here describes merely a strong *tendency* in human conduct and not a relation that exists independently of human will. The instincts of the lower animals perhaps occupy a position midway between the

rigorous sequence of inanimate nature and the strong but still controllable tendencies observable in human society. The word "law" thus has no fixed meaning even when applied to an orderly succession of phenomena.

§ 7. **Law as a rule of human conduct enforced by the state.** When we consider the statement: "A master is liable for the acts of his servants within the scope of the authority given them," we use the word "law" applied to it, in quite a different sense from its use in any of the foregoing examples. Nothing inherent in the nature of matter, or of consciousness, or of human society requires such a rule. In fact it does not exist (save in special cases) throughout a large part of the civilized world. Few would maintain that it had any divine sanction, and certainly in many instances neither the social nor individual conscience would deem it morally obligatory. Yet the courts of America and England apply the rule in actual litigation. Its sanction is neither fear of divine displeasure nor the dictates of public opinion or of private conscience. Organized society enforces it supported by the whole physical power of the state, if necessary. A law, in the true legal sense, is a rule of human conduct that will be enforced by the state through its public tribunals or officers. Its obligations bind human beings only, and its sanction proceeds from politically organized human society.

§ 8. **Suggested qualifications of this.** Some writers have thought true laws prescribe *general* rules for *external* human actions only. No doubt this is very generally true, but it seems to be not quite universal in fact

and not at all so necessarily. Conceivably an organized society might attach legal liability to the existence of evil states of mind, such as envy or hatred, just as heresy was once punished. If unaccompanied by appropriate external acts, the proof of such mental states would ordinarily be difficult or impossible, but the voluntary admission of their past existence by the person charged would be at least one permissible method of proof; and it seems baldly fictitious to assert in answer that what is punished in this case is the confession and not the preceding mental state. No such assertion would be made regarding the confession of an ordinary criminal act that could not be otherwise proven. Apart from merely speculative questions, however, it is certain that states today pass acts so affecting the rights of particular individuals or groups of individuals as by no means to be a *general* rule. Thus, where unrestrained by constitutional prohibitions, the legislature may enact that A and B shall no longer be husband and wife, or that X, Y, and Z may act as a corporation with certain powers, while denying to persons generally the right to obtain either divorces or corporate charters. So long as such acts are enforced by the courts they seem properly to be called laws, and this is the universal usage of the legal profession.

Section 2. Sources of Law.

§ 9. Custom. It is generally agreed that the earliest source of law was custom. Long before there was anything corresponding to a political organization that enforced rules of human conduct there were family and

group customs, originating in utility or religion or accident, that were normally followed under the sanction of divine command, public opinion, or family authority. When organized society of a rudimentary type undertook the enforcement of law, the more important of these customs doubtless constituted practically the whole body of the law. Today custom constitutes but a very small part of the law of any of the more progressive nations. As a source of law it has been almost wholly displaced by adjudication and by legislation, which are described below. On the other hand, by far the larger part of the law of the relatively stationary peoples of Asia is still immemorial custom, and the rigor with which this binds the lives of men to ideals of conduct but little suited to the modern world is the greatest obstacle to their sharing the active progressive life of the western world.

§ 10. Same: Illustrations. Even in early times doubtless all customs were not enforced by organized society. In periods of which we have a definite history we find the courts enforcing some customs and rejecting others, according as they have appeared reasonable, beneficial, not opposed to existing law, or the contrary. The early law of real property was almost wholly customary; and the present law of negotiable paper is chiefly founded upon the custom of merchants engaged in international trade as it developed in Europe before the year 1700. About that time the English courts began to adopt these customs and enforce them as English law and the process went on with great rapidity under Lord Mansfield after the middle of the eighteenth century.

That custom as a source of law still plays a part, though a small one, appears from some recent instances. The mining laws of California first enforced in the courts were the customs of the early gold miners of that state. See the article on Mining Law, Chapter I, in Volume V of this work. Even as late as 1875, in England, a custom of bond brokers to regard certain written promises to deliver bonds as having some of the characteristics of the bonds themselves was upheld by the courts, although inconsistent with the ordinary rules governing such instruments (1).

§ 11. **Adjudication as a source of law.** The early decisions of courts are based upon custom, or, that failing, upon the justice of the particular case. Subsequent similar cases naturally tend to be decided the same way, and a judicial habit of following precedents is likely to become established and finally to become obligatory. This has been the history of the common law for six or seven hundred years. The common law judges have professed to decide cases according to precedents where clear ones properly applicable could be found. Even decisions upon customs, being ordinarily more precise and definite than the custom, come to establish the law for later cases instead of an appeal being made to the original custom. Where no exact precedent exists, analogous ones will be followed; and so precedents are extended, modified, and applied to new situations until a question rarely arises for which there are not at least some strongly analogous

(1) Goodwin v. Roberts, L. R. 10 Exch. 337.

precedents. The court thus reflects, conservatively, the social ideas of its time, tempered by those of the immediate past, and really makes law by its decisions which become precedents for the future. This subject of judicial law-making has so important a place in English and American law that Chapter III of this Introduction is devoted to a thorough explanation and discussion of it.

Law created by custom or adjudication is often called unwritten law, as distinguished from law created by legislation, which is called statutory or written law.

§ 12. **Legislation as a source of law.** Popular custom and judicial precedent necessarily operate slowly and irregularly in making and changing law. In every organized state there exists some power deliberately to change the law for the future by legislative decree. The method and organ of legislation may vary from the edict of a czar to the vote of a town meeting. In primitive societies deliberate legislation is the least important source of law; in modern society it is by far the most important one. Custom as a source of law almost fails; adjudication is hampered by former precedents and by its inability to lay down comprehensive rules for the future; and extensive legislation alone enables the modern state quickly to adapt itself to changing conditions.

Most of the fundamental private relations between men have not been much affected by legislation. The great subjects of contracts, torts, quasi contracts, agency, domestic relations, equity, and the older crimes have in the main developed without legislative interference. The property rights of married women, the law of real prop-

erty, corporations, procedure, and the relation of master and servant are the principal branches of private law that have been substantially changed by statute; and in all of these the innovating legislation was compelled by fundamental changes in social ideals and organization. In recent years there has been much legislation designed to secure adequate public control of private acts and business, but not much effecting substantial changes in the law of private rights between individuals.

Section 3. Classification of Law.

§ 13. **Analytical classifications.** Law may be classified from many points of view. For instance, it may be divided into *public* and *private* law, accordingly as rights of the state are involved, or purely those of private persons. An incomplete division of a similar nature is indicated by the contrasting terms *civil* and *criminal* law, the former dealing with rights between private individuals, and the latter with the violation of public rights punishable as crimes by the state.

It may be divided into *substantive* law and *adjective* law (or procedure), accordingly as it concerns rights to be enforced, or methods of enforcing them. It may be divided into the law of *rights in rem* and of *rights in personam*, accordingly as rights exist against everyone, or only against certain definite persons; for instance, a right not to be assaulted exists against everyone, but a right to enforce a contract exists only against persons bound by the contract. It may be divided into *normal* and *abnormal* law, accordingly as the persons concerned

are free from or labor under certain personal disabilities, such as infancy, lunacy, alienage, coverture, criminality, and the like. Rights may be divided into *consensual* and *non-consensual,* accordingly as they arise from agreement or assent, or are given by law irrespective of assent; for instance, the right to enforce a contract arises only from an agreement to enter into the contract, while the right not to be robbed is given by law irrespective of the consent of prospective robbers (2).

§ 14. **Practical classifications.** The divisions indicated, though fundamental and important to a philosophical understanding of law as a science of human rights, are far too large and abstract to be conveniently used as a classification for practical professional purposes, either of study or of practice. The field of law is ordinarily divided by teachers and writers into forty or fifty subjects, each consisting of a group of closely related topics treated separately from other groups more from practical than from theoretical considerations, though there is usually some fundamental coherence between the topics in each group. Thus, the general subject of Contracts will be treated as one subject, and certain specialized kinds of contracts such as Sales, Negotiable Instruments, Insurance, Suretyship, Leases, Mortgages, and the like will be treated as other separate subjects. For very full treatment some of these subjects may be divided again;

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(2) See Holland, Jurisprudence (10th ed.), Chap. IX. Various systems of analytical classification of law are discussed in the article on Jurisprudence and Legal Institutions in Volume XIII of this work.

for instance, Insurance might be divided into the topics of Fire, Life, and Marine Insurance.

In this work, each of the principal subjects generally recognized by modern teachers and writers is treated in a separate article, subject to two qualifications. Subjects dealing with the organization and administration of government (national, state, and municipal), and subjects that are minutely regulated by statute have been generally omitted, both for want of space and because these subjects deal with ordinary private rights between individuals to but a small extent.

§ 15. **The common law.** The term "common law" is used in legal writings with a variety of meanings, usually apparent from the context. 1. In its widest sense the term is used to contrast the entire system of English or Anglo-American law with other great systems, usually the Roman or civil law. In this sense it includes not merely all unwritten law, but such statutes as have been generally enacted in jurisdictions where it prevails and are so interwoven with the general principles of the unwritten law as to form a unified whole. 2. In a narrower sense it is used to distinguish the rules of unwritten law applied in England by courts of law (or of common law), from those applied there by courts of equity, courts of admiralty, the ecclesiastical courts, and so forth. In this sense it also ordinarily includes the older statutes that have become deeply imbedded in the system, particularly those affecting property rights. Where, as commonly in America, and now in England, the same courts apply the rules both of law and of equity, this usage of the term

refers to those rules that would be applied by courts of law, if the former division still existed. 3. In its narrowest sense it excludes from its meaning even those ancient statutes referred to under meaning 2, above.

In all three of the above senses, the common law is in force in all American states, except Louisiana, which has been under the civil law since the days of its French and Spanish settlement. The common law of any one of our states is somewhat different from the common law of England, due to the operation of two causes: (a) Part of the English common law not suited to the conditions of this country was not applied by our courts. (b) Local customs and adjudications here, after the settlement of this country, have departed somewhat from those of England since then. For the same reason the common law rules of no two of our states are exactly alike; and, in addition, the states are not agreed upon the date at which the English common law and existing statutes applicable to the colonies are to be accepted as a starting point for American variations from them. The dates most commonly fixed for this purpose are May 13, 1607 (first permanent settlement of Virginia), and July 4, 1776 (Declaration of Independence).

CHAPTER II.

OUTLINE OF ENGLISH LEGAL HISTORY.

§ 16. Roman and English law. Scope of chapter. Two great systems of law divide the western civilized world between them, the Roman and the English. The Roman is much the older, and was a highly developed system of law, well adapted for the needs of an advanced and progressive civilization, at a time when some of the rules of English law were first being cast in written form. The Roman mind had a distinct genius for law, and the extension of that law over a vast empire gave it a cosmopolitan character. When the Roman Empire fell to pieces in the middle ages, under the assaults of its Teutonic conquerors, the latter gradually adopted the Roman law as the basis of their public and private jurisprudence. The great influence of the French Napoleonic code, almost wholly Roman, completed the work, so that today it can be said in general that the law of all continental Europe is Roman in origin, except for the retention in various localities of customary law, chiefly concerning land holding and the family relations.

The law of England, for historical and geographical reasons, has had quite a different history; and some understanding of this is so important as a setting for the principal legal doctrines of English and American law,

that a short chapter will be devoted to a sketch of the development of English law.

Section 1. Early Influences Affecting English Law.

§ 17. Britains and Romans. One half century before Christ, the Romans, under Julius Caesar, first landed in Great Britain, and found the island inhabited by a rude, warlike people. More than a century later the Romans had conquered the island as far north as the present Scottish border, and, during more than three centuries, Roman government and civilization existed in England. Only the upper classes were Romanized, however, and when the Roman troops were called home in the fifth century to defend Rome from the Goths, internal struggles began in Britain, aggravated by attacks from enemies in Scotland and Ireland. A party in Britain invited to their assistance a Teutonic band from Jutland (now part of the Danish peninsula) and the Jutes landed in England in 449. These allies proved uncontrollable, and during the century and a half following, they, with successive bands of their neighbors, the Angles and the Saxons (whence the name Anglo-Saxon), conquered the greater part of what is now England. The contest between the British and the invaders was so bitter that the former were practically exterminated, and with them perished the ancient British laws and customs as well as the veneer of Roman civilization. For this reason English law from the Anglo-Saxon conquest developed quite free from the Roman influence that so thoroughly displaced the Teutonic laws of the conquering Northmen on

the Continent. Whatever influence Roman law has had upon the English system came at a much later time.

§ 18. **Anglo-Saxons and Danes.** For two centuries and a half after the conquest of Britain the Teutonic invaders were divided into a number of rival warring kingdoms. At first seven such petty nations emerged, later diminished to three, and finally united into the single kingdom of Wessex in 828. About this time the Danes began to harry the kingdom, coming in pirate ships from the Scandinavian peninsulas, and, after a struggle of varying fortunes, the brightest figure in which was Alfred the Great, the Danes became the rulers of England in 1013.

The Anglo-Saxons and their kinsmen were a fierce, independent, liberty-loving people, not readily subjecting themselves to any centralized government; and this racial tendency towards separation was increased by the strife between their kingdoms in Britain. The whole Anglo-Saxon and Danish period is marked by the growth of an immense variety of local customs in England, having some similarity, but preventing the formation of a true national law. A considerable number of collections of laws of the various kingdoms at different times have come down to us. The earliest of these, the laws of Ethelbert, king of Kent, were put in writing about the year 600; and most of the more important rulers between then and the Norman conquest also published sets of laws in their names, such as the laws of Inne, Offa, Alfred, Edward the Elder, and Canute, the Danish king.

These written laws do not deal much with matters of private right, except as regards the preservation of the

peace. Private feuds were frequent, and legislation strove to compel the acceptance of money damages in place of private vengeance. Private law doubtless depended largely upon local custom.

§ 19. **The Normans.** The Norman conquest, immediately after 1066, introduced into England a centralized administration of fiscal, military, and judicial matters quite foreign to Anglo-Saxon rule. The feudal system, if not introduced by the Normans, was greatly strengthened and elaborated by them; and the confiscation of estates made by King William enabled him to make grants of lands to his followers upon terms binding them into a compact feudal organization. The nature and incidents of the feudal system as regards land-holding are described in the article upon the History of Real Property Law in Volume V of this work. Commissioners inquired the value of each estate, and the sums due from it to the crown as royal revenue; these particulars being recorded in the famous Domesday Book. Even the church and its holdings were made dependent upon the royal power. So far as was consistent with the primacy and security of the crown, however, English laws and customs were respected and confirmed, though the local courts were subjected to the jurisdiction of the king's court which heard appeals from them. This naturally tended toward the unification of the law.

Section 2. Development of English Law from Henry II to American Independence.

§ 20. Early modes of trial. The Anglo-Saxons and the Normans had the various modes of trial that have developed the world over when a certain middle stage of culture has been reached. That is, they had trial by oath, by ordeal, and by battle. Trial by oath (wager of law) was not a trial by the oath of witnesses who could swear to a fact from personal knowledge, but consisted in securing a certain number of persons who would swear with certain solemnities that they believed a party guilty or innocent. Sometimes a defendant might free himself by his own oath given in a certain form. Trial by ordeal was common until about 1215, when it appears to have been forbidden by the church. The mode of procedure for this is described in the article on Criminal Procedure, § 59, in Volume III of this work. Trial by battle (wager of battle) was introduced into England by the Normans, but was a hated innovation and probably but little used. It became obsolete centuries before it was formally abolished in 1819 in England.

§ 21. Trial by jury. The institution that perhaps more than any other distinguishes English law from other systems is trial by jury. The rational determination of questions of fact is a difficult problem for the most highly developed societies; for primitive peoples it is well nigh impossible. The germ of jury trial as a mode of determining facts came through the Norman conquest. The dukes of Normandy, in matters of fiscal administra-

tion, had employed in France a system called the inquisition. Questions relating to the royal revenue were answered under oath by persons who knew the facts at issue; and the sovereign when acting as judge between his subjects sometimes required the same procedure. The Normans at once introduced the inquisition into England in fiscal matters, and permitted its occasional use in civil cases. In the last half of the twelfth century Henry II greatly extended the latter use of the inquisition. The new forms of action authorized by his various legal reforms all required a jury, and the sudden abolition of the ordeal assisted in the rapid triumph of the new method of trial. Before the year 1300 the jury was in common use in England in all kinds of actions—other modes of trial were the exception.

The original jury was a far different institution from the one we know today. Originally it consisted of an uncertain number of men, chosen because they already possessed information about the fact at issue, and who declared the fact chiefly from their own knowledge. Where experts were needed they were simply added to the jury. It was a matter of centuries of development before the jury came to be composed of precisely twelve men, who acted only upon sworn evidence presented to them at the trial, and whose verdict, required to be unanimous, was kept within the bounds of reason by a judge's power to grant new trials. An account of the effect of this development of the jury upon the law of evidence will be found in the article on Evidence in Volume XI of this work. A detailed account of the procedure of a jury trial

in a criminal case is given in article on Criminal Procedure, Chapter V, in Volume III of this work (1).

§ 22. Legal reforms of Henry II. Henry II was the first great English legislator. The earlier collections of Anglo-Saxon laws, though doubtless new in part, did not profess to be new legislation so much as a re-affirmation of laws already approved by custom or other legal sanction. Coming to the throne in 1154, Henry reigned for thirty-five years. He endeavored with a fair measure of success to draw the line between the jurisdiction of the temporal and the ecclesiastical courts, so as to retain in the royal hands the power necessary for a strong national government. In the ecclesiastical courts the canon law was just becoming a well-developed system, which was to have a considerable influence upon the English law of marriage, of wills, and of the administration of estates of deceased persons. Better remedies were provided for landholders in the king's courts, so that actions concerning the possession of land were now usually brought there instead of in the local courts; which of course tended to produce a really uniform national law upon the subject of land tenure, by far the most important class of litigation at this time. The extension to private litigation of the inquisition (§ 21, above), now called the recognition, which was the early trial by jury, was due to legislation of Henry; and he also introduced the practice of having the judges of his courts go upon regular judicial circuits throughout the country, so that the common law was en-

(1) An excellent account of the history of trial by jury in England is in Thayer's Preliminary Treatise on Evidence, 47-182.

forced uniformly all over England by a single body of well-trained lawyers. Probably in Henry's time judicial records began to be officially kept in an orderly way, for shortly after his death we begin to have a series of records of cases that have been preserved to the present time.

One noteworthy achievement of Henry's reign was the extension of the criminal law so that deeds of violence were regularly punished in the royal courts at the suit of the crown, in place of by mere private vengeance, or even by an accusation brought at the suit of the person wronged. Better than anything else, perhaps, this shows the increasing vigor and reach of the royal government.

§ 23. **Magna Charta.** The great importance of Magna Charta is rather to English constitutional law than to the law of private rights. The outrageous government of King John in the early years of the thirteenth century arrayed against him substantially the entire English people, nobles, churchmen, and commons; and at Runnymede, in 1215, they compelled him to assent to a grant of privileges from the crown to the English people. The most important of these concerned the administration of justice and the levying of taxes, though various clauses dealt with municipal, feudal, and commercial privileges. The two articles of the great charter most frequently quoted are the 39th and the 40th:

39. "No freeman shall be arrested or detained in prison or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

40. "To no one will we sell, to no one will we refuse or delay right or justice."

To these articles may be traced some of the most important guaranties of individual liberty and property contained in our American constitutions (see the article on Constitutional Law in Volume XII of this work).

Magna Charta has been confirmed by other English sovereigns many times since the day of John. The principle that the crown was bound by the fundamentals of constitutional law, without an expressed assent, was established slowly; and John's successors broke the charter, and then reconfirmed it as the price of a grant of money from the nation through a long course of years. The principles of Magna Charta are now the bed rock of the English constitution.

§ 24. **Legislation of Edward I.** Edward I was another great legislator; indeed, he has been called the "English Justinian." He completed the judicial reforms begun by Henry II. The king's court, which had been in process of division for some time, was now definitely separated into three courts of law, the king's bench, the common pleas, and the exchequer. The king's bench had jurisdiction over criminal cases, it controlled various royal officers, and it had a civil jurisdiction over all actions where there was a breach of the peace. The common pleas was the court of general jurisdiction for actions between private persons; and the exchequer originally dealt with cases concerning the revenue of the crown. The jurisdiction of these three courts overlapped at places, and by a series of legal fictions they finally came to be con-

current over many matters, especially in private litigation, though they were not consolidated until 1875. The separate judicial powers of the chancellor began to be recognized, as well as the jurisdiction of the king in council, which gives us the germ of the court of equity, the star chamber, and the privy council later.

In Edward's reign the statute of mortmain was enacted which forbade the transfer of land to religious bodies so that it should cease to render its proper feudal service to the king; the statute of Winchester, which provided on an elaborate scale for the enforcement of public order; the statute of merchants, which provided for the better collection of trading debts; the statutes de donis and quia emptores, which deeply altered feudal land-holding and became the basis of English real property law for centuries; the statute of Westminster II, which provided for new forms of remedy in the royal courts for causes of action not included under the old writs; and Parliament in something like its present form became established as the regular legislative body of the kingdom.

"The main characteristic of Edward's statutes is that they interfere at countless points with the ordinary course of law between subject and subject. They do more than this—many clauses of the greatest importance deal with what we should call public law—but the characteristic which makes them unique is that they enter the domain of private law and make vast changes in it. For ages after Edward's day, king and Parliament left private law and civil procedure, criminal law and criminal procedure, pretty much to themselves. . . . We may

turn page after page of the statute book of any century from the fourteenth to the eighteenth, both inclusive, without finding any change of note made in the law of property, or the law of contract, or the law about thefts and murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft or murder may be punished" (2).

§ 25. **Legislation of Henry VIII.** The period of Henry VIII was also one of great legislative activity. For the first time the church was legally wholly subjected to the state, the Church of England was severed from the Church of Rome, and the English king was made supreme head of the national church. The statute of uses (1535) revolutionized methods of transferring title to land and made possible the creation of future estates that has since become one of the principal characteristics of English and American real property law. See History of Real Property, §§ 34-41, and Title to Real Estate, §§ 35-41, both in Volume V of this work. The statute of wills (1540) enabled the owners of land to devise all that was held in socage tenure and two-thirds of what was held by the common military tenure (see History of Real Property, §§ 4-11, in Volume V). During this reign also there was made the last serious attempt to supplant the common law by the Roman or civil law, that was then securing general acceptance on the continent of Europe.

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(2) Maitland, Const. Hist. of Eng., 19.

Although the attempt had some encouragement from the king, himself, it signally failed (3).

§ 26. The Stuart period. Under the Stuarts the important constitutional controversies between the crown and the people over taxation, monopolies, and the arbitrary administration and suspension of laws were finally settled. The power of the crown to grant monopolies was forbidden by an act of Parliament in the reign of James I, who had openly professed to act upon the theory of "the divine right of kings;" and his son Charles I was compelled in 1628 to assent to the Petition of Right, which forbade taxation except by consent of Parliament. After the dissolution of this Parliament, however, Charles attempted to collect ship-money, really a tax. The long Parliament, which assembled in 1640, declared this practice illegal and abolished the star chamber and two or three other similar courts through which the king had arbitrarily enforced his will. Charles I was executed in the civil war that followed, and when Charles II came to the throne at the Restoration in 1660 he forebore further open resistance to the principles thus established. In 1679 the personal liberty of the individual was further protected by the habeas corpus act which prevented arbitrary imprisonment by the crown. Under James II the contest over the king's prerogative began again when he attempted to suspend the operation of penal laws. The Revolution of 1688 followed, and the great statute called the Bill of Rights, enacted at the accession of William

(3) Maitland, English Law and the Renaissance, 3 Essays in Ang.-Am. Legal Hist. 168, ff.

and Mary, finally settled the long contest against the power of the crown. By this act and the Act of Settlement, a few years later, all power was taken from the crown to tax, to interfere with existing laws, or to control the administration of justice by removing judges.

The principal changes in private law made during the Stuart period were by the general statute of limitations of 1624, limiting the period within which all kinds of actions might be brought; the abolition of the military tenures and their burdensome incidents in 1660 (see History of Real Property, § 10, in Volume V of this work); and the statute of frauds (1677), which required conveyances and contracts concerning land, and many concerning chattels, to be in writing in order to be enforceable in the courts. The first and the third of these statutes have been the model for American legislation of the same character.

§ 27. **The eighteenth century.** Between the Act of Settlement in 1701 in England and the Declaration of Independence in 1776 in America, there was little development of English law of much historical significance. The unwise conduct of Parliament in attempting to tax the American colonists gave rise to armed political resistance, culminating in American independence; and the incidents of this struggle had considerable influence upon the doctrines of American constitutional law. See the article on Constitutional Law in Volume XII.

§ 28. **Growth of judge-made law.** From the time of Edward I until well into the nineteenth century, a period of five hundred years, the English law of private

rights, other than those concerning the transfer of real property, was very little affected by legislation. It was altered slowly from generation to generation as legal precedents were clipped or expanded to meet the more pressing social needs and changes. In many important particulars it changed little or none during this long period. The harshness of the criminal law and the technicalities of procedure in civil suits increasingly lessened the efficiency of the common law. But for the system of equity, which had a large development in the latter part of this period, some of the legal reforms of the nineteenth century must have come much earlier. The enormous expansion of business which followed the application of steam power to industry and transportation compelled reforms in procedure which have only recently been completed in England, and which, in this country, still proceed all too slowly. The increasing ease and rapidity with which legislative changes can be made have considerably checked the development of judge-made law in recent years. See Chapter III, below.

Section 3. Courts of Equity.

§ 29. Original theory of king's courts. The early theory of the royal courts in England, closely connected with feudal doctrines, was that it was part of the king's prerogative to administer justice between his subjects. At first the jurisdiction was confined to matters connected with the interests of the crown, other matters being decided in the local courts. Later appeals were allowed from the local courts to the royal courts, and finally all

important original jurisdiction was also acquired by the latter. Before the fourteenth century the king himself sometimes administered justice in his court, and until a very late period the ordinary national courts were considered the king's deputies for this purpose. After the ordinary law courts had become well separated in function from the individual action of the king, the king in council, exercising a kind of reserved power in the administration of justice, interfered more or less with the law courts and attempted to control their actions. Petitions were directed to the king by persons who wished such interference in their cases, and, as the chancellor became the king's chief legal adviser, the petitions finally were directed to him. Parliament remonstrated at times against such interference with the ordinary course of law, and, in the fifteenth century, the practice was generally abandoned as to civil cases for which there was an adequate remedy in the common law courts.

§ 30. **Early development of court of chancery.** About this time a large and highly important class of cases developed, which the inelasticity of the common law prevented its courts from dealing with properly. The common law recognized as the owner of property only such persons as had a *legal* title to it, that is, a title acquired according to the forms and conceptions already established by the common law. If A conveyed the title to his land to B, upon B's promise to allow A the beneficial use of the land, the common law recognized B as the absolute owner, and B's promise to A was but a moral obligation not enforceable in court. This method of dealing

with land, putting it in trust, as it is called, proved a highly convenient device for evading various heavy feudal burdens of landowners, and particularly the forfeiture of land for treason or other crimes. During the Wars of the Roses, most prominent landowners in England committed treason against one king or another in the varying fortunes of the struggle, but their estates, if conveyed in trust for their families to some lowly noncombatant, were not forfeited thereby. If the grantee, however, proved faithless to his trust, and refused to allow the beneficiaries to receive the proceeds of the property, the latter were without remedy at law. This remedy the chancellor began to give by ordering the grantee to carry out his moral obligation under pain of imprisonment. Upon this power of the chancellor is founded the whole system of uses and trusts that was and is of such vast importance in our law. The growth of this branch of equity is fully treated in the article on Trusts in Volume VI of this work.

As the number of such cases grew it became necessary to dispose of them according to some regular judicial procedure, and thus in time the jurisdiction of the chancellor became that of a regular court of justice, the court of chancery, presided over by the chancellor and administering rules different from, but existing side by side with, those of the courts of common law. By the sixteenth century this result had been reached.

§ 31. Contest between chancery and common law courts. Not only did the chancellor and the court of chancery exercise a new jurisdiction by enforcing rights not recog-

nized in the common law courts, like that of the trust in land mentioned in the subsection above, but they also interfered with the exercise of admitted common law rights, in certain cases where such rights were being unfairly exercised to the injury of another. For instance, suppose A obtains from B, by fraud, a bond for the payment of money. The possession of this bond, although thus obtained, gave A a perfect legal right to collect the money in a suit on the bond in the common law courts—fraud not being a defence in such a case. From the fifteenth century, however, the chancellor would enjoin A from collecting a bond obtained by fraud, and imprison him for disobedience. More than this, the chancellor would even forbid the execution of a judgment obtained in the common law courts themselves, if it was gained by fraud. This latter jurisdiction excited great opposition from the common law courts, and, after a controversy, in Parliament and out of it, extending over more than a century, Chief Justice Coke attempted in 1615 to enlist the aid of King James I to forbid this chancery jurisdiction. A commission, to which the matter was referred for investigation, reported in favor of the chancellor's practice. The king approved the report and thus finally settled the dispute.

§ 32. **Development of equity jurisdiction.** The early chancellors, in the formative period of their jurisdiction, necessarily were not governed by fixed rules in granting their relief; and, for various reasons, the principles upon which they acted were much more vague and ill-defined than the doctrines of the common law. For a long time

this gave point to the jest of Selden, that "Equity is a roguish thing, varying with the length of the chancellor's foot." After the restoration of Charles II to the throne, Lord Nottingham became chancellor, and during his term of office the principles of equitable relief were so systematized and explained in his decisions that he has become known as the "Father of Equity." Two other great chancellors contributed notably to the completion of equity as a system—Lord Hardwicke in the middle of the eighteenth century, and Lord Eldon in the first quarter of the nineteenth. Under the latter the system assumed its final form, and, since his time, it is rare that courts of equity have exercised a jurisdiction more extensive than that finally established by Lord Eldon.

§ 33. **Function of equity.** Not only did equity recognize and enforce useful rights unknown to the common law, but it supplemented the remedial deficiencies of the older system in many ways indispensable to the needs of modern society. The common law had almost no preventive power; it could only redress injuries after they had occurred. Equity restrained threatened wrongs by issuing injunctions, and parties were thus enabled to have their rights determined in advance of the infliction of actual injury. In most instances the common law did not give a plaintiff what he had bargained for, but only money damages. It did not order the defendant to discharge any duty he owed the plaintiff, but it merely gave such reparation as could be gained from the seizure of the defendant's property. Equity ordered the defendant to perform his obligation in many cases where paying for

the breach of it would not amount to performance. The common law could not deal with more than two sets of parties in a single litigation. Cases of the inter-related rights of several persons, as in cases of suretyship, partnership, and bankruptcy, could not be adequately handled in a common law court. A critically situated business could not be nursed along by a receivership at common law. No judgment could be given, conditional upon the performance of future acts by other parties. A common law judgment was either absolutely given or denied. In all of these respects equity afforded flexible remedies, and a procedure that adapted itself to the demands of business and of justice. When the two systems were finally fused in England, in the latter part of the nineteenth century, the consolidating statute provided that wherever the rules of law and of equity applicable to a case differed, the equity rule should be administered by the court. A full discussion of the peculiar doctrines of this great companion system of the common law will be found in the articles on Equity and Trusts in Volume VI of this work. In most American states the two systems of law and equity are administered by the same courts and judges, but their separate doctrines are preserved in a manner that has an important effect upon both the form and substance of judicial relief. See the articles on Equity and Trusts in Volume VI, and on Pleading in Volume XI of this work.

SECTION 4. OTHER ENGLISH LEGAL SYSTEMS.

§ 34. Admiralty law. Canon law. Law merchant. In addition to the systems of common law and equity, there have been at various times in England several other systems of law, having separate courts and providing different rules from the courts of law and equity. The more important of these were admiralty and canon law, and the law merchant. Admiralty law dealt with maritime affairs, and this jurisdiction is still preserved distinct from law and equity in both England and the United States. In this country it is exclusively administered by the Federal courts. Canon law dealt with ecclesiastical affairs, a term that earlier included much more than it does now. Marriage and divorce, wills of personal property, all offences against morals—these were within the early jurisdiction of the ecclesiastical courts, as well as matters that actually concerned the church and ecclesiastics. The English reforms of the nineteenth century swept away substantially all of this jurisdiction except that over church discipline. In America there are no ecclesiastical state courts because there is no official or established religion. The law merchant dealt with mercantile or trade affairs, at first between all merchants, and later only where foreign merchants were concerned. This law was early administered in England by local commercial courts in the port towns and trade centers. By the sixteenth century, however, the rules of the law merchant between domestic traders had been absorbed into the common law system, and by the year 1700 the same thing had happened where the foreign merchant

was concerned. The law merchant as a separate system had ceased to exist.

Section 5. Classical Legal Literature.

§ 35. Early legal literature: Glanville and Bracton. In the reign of Henry II was written the first general treatise on English law, probably by Glanville, who was Henry's justiciar. It was written about 1187 and deals with the law administered in the royal courts. A book on canon or ecclesiastical law, and one on the proceedings in the king's exchequer were also written during this reign. About seventy years later another general treatise was written by Bracton, who had been one of the royal judges. A large part of it consists really of Roman law, which was much studied under Henry III. At this time, when the judges were largely ecclesiastics, learned in both the canon and the Roman law, there was considerable likelihood that the well systematized Roman law would largely replace the confused and unorganized English common law. In the reign of Edward I, however, this tendency had passed away, due to several causes. Parliament had refused to alter the English law of legitimacy to correspond with the Roman law, and, in refusing, had said they did not wish to change English laws hitherto used and approved. This doubtless represented the common feeling of both nobles and people. In Edward's time, church officials ceased to sit in the king's courts as judges, and so a judicial knowledge of the Roman law died out. Moreover, the extensive legislation of Edward's time so altered private rights as greatly to

increase the difficulty of applying to them a system of law created without reference to such legislation. Most of the Roman law in Bracton is now thought not to have represented the law actually administered in English courts of his day, but to have been a suggested improvement. Where Bracton cites actual decisions for his statements they are nearly always distinctly English rather than Roman law. Probably, therefore, Roman law never actually gained much foothold in the English courts, although it might easily have done so under slightly different circumstances. Two treatises on English law in Edward I's reign, by Britton and Fleta, show the changes that took place in that period.

§ 36. **Same: Year Books. Littleton's Tenures.** About the same time (1290) begins the series of Year Books. They are brief, informal reports of cases heard in the royal courts. Who reported them and under what authority is doubtful, and they are of very uneven value. They usually contain a statement of what the case was about, some argument of counsel, and the opinion of the court. Colloquies between court and counsel are frequently reported, sometimes accompanied by lively comments of the reporter. These reports extend from the time of Edward I to Henry VIII, a period of nearly two hundred and fifty years. They are written in the law French of the period, and, although very badly edited, they are, with the four general treatises above mentioned and Littleton's Tenures, our principal sources of knowledge of the English common law to the time of Henry VIII. The last-named book is the famous classic upon

the English land law of the period. It was probably written about 1475, and was printed a few years later, being the first English law book printed. Seventy editions of it were published in one hundred and fifty years, and then appeared Coke's equally famous Commentary upon the Tenures. The new work also ran through many editions and, next to Blackstone's Commentaries, was the most notable English law book ever published.

§ 37. **Lord Coke.** Two other great law writers of a later period should be mentioned. The first is Sir Edward Coke, who was prominent politically and judicially during the reigns of Elizabeth and James I. He became chief justice of England and was removed by James for lack of subserviency. His great work was his Commentary on Littleton's Tenures mentioned in the subsection above, which has been described as "a stupendous commentary which contains the gleanings of a peculiarly laborious life and covers almost the whole domain of English law. Coke upon Littleton, unrivalled among law books for vast and various learning, has a curious place in the general history of literature, for it presents the most conspicuous example of a masterpiece upon a masterpiece—much as if the plays of Shakespere were entwined about the Canterbury Tales" (4). Treatises upon Magna Charta and other legal subjects, and eleven volumes of reports, containing the important cases of his time, are Coke's principal other works. His reports, particularly, enjoyed an enormous prestige.

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(4) Wambaugh, Introduction to Littleton's Tenures, 42.

§ 38. Blackstone. Between 1765 and 1769 were published the four volumes of Commentaries on the Law of England by William Blackstone, Viner Professor of English law at Oxford University. In it appeared, for the first time, a thoroughly clear and readable account of the whole field of English law as it existed at that date. No other book has ever so popularized the study of law, and for a hundred years it was the principal subject of study by students preparing for the bar, in both England and America. It is said that as many copies were sold in the American colonies before the Revolution as in England. The work exercised great influence in American courts for the first fifty years after the Revolution, due to its own merits as well as to the scanty legal libraries in many parts of this country. Its authority for either student or lawyer has been much lessened, today, by the considerable changes that have taken place in the law since Blackstone's time, and by the work of legal scholars who have shown much that is fictitious in its legal history and reasoning. It is still, however, the great work upon the English common law of the eighteenth century before it was touched by the hands of legal reformers.

CHAPTER III.

USE OF JUDICIAL PRECEDENTS.

§ 39. Occasion and mode of judicial law-making. As has already been explained (§§ 9-12, above), the law as enforced in the courts may be derived from custom, from legislation, or from judicial precedents. The operation of custom and of legislation has already been explained, and it remains to discuss law-making by judicial precedent (1).

A court must decide in one way or another each case brought before it, and it must decide it according to some general rule, which is the quality that distinguishes law from individual caprice. The court may find this general rule in some acceptable custom, properly proven; or it may find it in some act of legislation, ranging all the way from a constitution to a municipal ordinance or the rules of a governmental department; or it may find it in the precedent established by the former decision of some similar case. Occasionally, no rule applicable to the precise case before the court can be discovered from these sources, and then the court itself must establish a rule. Of course no case ever arises today so novel that it can not be decided by analogy to some existing rule of law; but cases frequently arise where there are conflicting

(1) The topics treated in this chapter, with a variety of related matters, are very fully discussed in an excellent book, The Study of Cases, by Professor Eugene Wambaugh of the Harvard Law School.

analogies, no one of which is clearly stronger than the others. Here the court must decide between the rival analogies, and in so doing it really makes a new rule of law, which may become a precedent for future decisions upon similar cases. Periods when social conditions are rapidly changing, from whatever reasons, are likely to present many such cases, and accordingly we find that judicial law-making goes forward with great rapidity at such times. Sometimes social changes are too rapid and too great to be successfully met by such changes in the law as courts feel at liberty to make, and so the desired reforms are brought about by legislation. This is what commonly happens today, and important changes in the law by judicial decisions are now rare, though small ones are constantly made.

§ 40. **Same: Illustration.** The decisions of the courts upon the right to use the earth for currents of electricity furnish a good recent illustration of how judges even today may make important rules of law. Few general principles of law have been better settled than the absolute right of a landowner to exclude interference with his possession, whether upon the surface, above it, or below it. Any physical intrusion upon the air space over his land, or under ground, even though unaccompanied by the slightest damage, was deemed sufficient for a right of action, as much as if the intrusion was upon the surface of the land. Then various uses of electricity were discovered, among them the telephone. The rather feeble current of this invention was used over the wire to carry sound, and the earth was used for the return current.

When the electric light and trolley car were invented, their very powerful currents also used the earth for their return; and they interfered with the telephone current, and even affected the delicate telephone apparatus through wires of the latter grounded on land owned by the telephone companies. On its face, it looked like a clear invasion of the rights of a landowner, but here were two great conflicting public interests to be adjusted. It appeared that, by the use of an extra wire, the return current of either the telephone or the trolley wire could be carried upon a metallic circuit, without entering the ground. The orthodox analogies were in favor of compelling the trolley companies to do this, as they seemed to be interfering with the rights of others; but it also appeared that this was a far more expensive matter for the trolley companies than for the telephone companies; and the unknown future of electric power transmission was likely to be burdened with a similar expense, an expense that in all cases would ultimately be borne by the public. The courts, therefore, decided that a landowner could not claim the right to be free from outside electric disturbance of electric currents even upon his own land; and the telephone companies have been obliged to put in metallic circuits instead of the trolley companies (2). Doubtless a similar decision will be reached when some landowner tries to restrain the trespasses of flying-machines so far above the surface as not to interfere with the use of his land.

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(2) Cumberland Teleph. Co. v. United Elec. Ry. Co., 42 Fed. 273.

§ 41. **Judicial precedents ordinarily followed.** When, after due consideration, a court has laid down a new rule of law, as explained above, it will ordinarily follow this rule in succeeding cases sufficiently similar in their facts to seem clearly to involve the same principle. That is, the rule once laid down in a decided case becomes a precedent for future decisions. There are some advantages, and some disadvantages, in this. The obvious disadvantage is that, as precedents accumulate, the law becomes constantly less flexible, and an increasing number of changes must be made by legislation. Under the most intelligent direction it is often difficult to frame a statute that will cover no more and no less than was intended; and the conditions under which much legislation is enacted in this country are unfavorable to a high degree of either care or skill in this respect. On the other hand, the advantage of following general rules laid down in previous decisions is that it secures some degree of certainty in the unwritten law. A known rule, though not the best one imaginable, is far preferable to treating each case as a new problem, to be decided as may appear just independently of all that have preceded it. Men's ideas differ so about abstract justice that, without a more definite guide than this, one could seldom be certain what legal consequences would flow from any course of conduct.

The only reasonable alternative to following judicial precedents is an extensive codification of the law, by legislation which shall somewhat minutely define all of the legal rights and duties of men. Such a code is of course less elastic than even judge-made law, but it may be al-

tered as occasion requires by new legislation. In general it may be thought that subjects that have been fully developed by judicial decisions may be advantageously codified, while subjects that are still in the formative stage may well be left for the courts to work out their details.

§ 42. **How far decisions create precedents. Illustrations.** In English and American law the doctrine has been well settled, for over six hundred years, that decisions create precedents which the courts are ordinarily bound to follow as the existing law. This is called the principle of "stare decisis" (abide by what has been decided). It is highly important, therefore, to understand just how far a decision has this binding force. Each decision purports to be made as a result of the application of some general rule. It is the general rule, then, that becomes a precedent. Is this general rule to be accepted as the court states it, or is it to be determined by other tests?

Suppose A is attacked by X's dog, where he might avoid injury by leaping a fence or shutting a door. Instead, he stands his ground and kills the dog, whose owner sues A. Suppose the court decides in favor of A, giving as a reason that to save himself or his property a man may destroy whoever or whatever is invading his rights. Does this decision become a precedent for the entire rule laid down by the judge; so as, for instance, to cover the case of A, when attacked by X's horse, or by X; or of A's dog, when attacked by X's dog, or horse, or by X himself? Now, while these other cases bear some general resemblance to the original case, most of them

involve additional circumstances of sufficient importance so that they might reasonably be decided differently from the first case, granting the correctness of that. A man may well be allowed more latitude in defending himself than his property; and more in defending himself from an animal than from a human being. The general proposition laid down by the court above is much wider than is necessary properly to decide the original case; and it is a salutary rule of precedent-making that a court can give no binding force to a rule wider than is fairly necessary to decide the actual case before it.

How wide a rule is fairly necessary to the decision of the case just put? Suppose A were attacked by X's cat instead of his dog, would the decision in the dog case control the cat case? Or suppose he were attacked by Y's dog instead of X's, or by a different kind of a dog belonging to X? Clearly the precedent is wide enough to cover any owner, and any dog large enough to threaten real injury. Conceivably, a mere puppy might be outside the precedent. Likewise, it is pretty certain that any animal somewhat similar to a dog in value or usefulness would be included by the precedent. When we put the case of A's being attacked by X's horse and able to save himself by a slight exertion, instead of which he kills the horse, we face a harder question. Horses are usually more valuable and more useful animals than dogs, and hence may be entitled to more consideration. There will be room for reasonable difference of opinion as to whether the horse case was fairly within the precedent of the dog case. Clearly A couldn't kill X himself to avoid a

slight injury, which he could escape entirely by slight exertion.

§ 43. Same: Conclusion. From the above considerations it appears that one may say, roughly, that a case becomes a precedent only for such a general rule as is necessary to the actual decision reached, when shorn of unessential circumstances. In the illustration given above, the name of the owner and the fact that the animal was a dog instead of a cat are unessential circumstances. The change from a dog to a horse may be sufficiently great to be essential, and so on. The illustration also shows how difficult it may be to decide how much ground a precedent really covers, and gives an indication of the large scope presented for the exercise of ingenious legal argument and judicial common sense in construing and applying precedents. It is this that is the peculiar task of the lawyer and the judge.

§ 44. Same: Several questions in a case. The matter may be much further complicated, if there are several doubtful points of law in a case instead of merely one. Suppose, in the case already put, that A was in his own door-yard when X's dog attacked him, and suppose also that X had set the dog upon A in order to rob him. In addition to the general proposition that a man might kill a dog anywhere to protect himself from a wrongful attack, it might be argued that he had this right when attacked on his own premises, and that he had it when preventing a felony. Suppose the court decides that all three propositions are correct, for how much will the decision be a precedent? Inasmuch as the first proposition includes

both of the others, it is evidently wider than is necessary for the decision of the case, and the case, therefore, ceases to be a precedent for the wider rule. The last two propositions do not necessarily include each other, but either one alone would be sufficient for the decision. Neither one, therefore, is alone necessary for the decision, and so neither one is of full binding force as an authority for future cases; though both are entitled to a certain amount of respectful consideration.

§ 45. **Same: Dicta.** A statement of law by a court, laying down a rule wider than is required by the particular case before the court, is called a *dictum* (plural *dicta*), and the same term is applied to any statement of law not necessarily connected with some point actually involved in the case. Dicta, while not treated as precedents, are given some consideration in the decision of future cases, depending upon the reputation and rank of the court or judge uttering them, and upon the amount of deliberation with which they were uttered. Where a case involves several points, and the decision is placed upon more than one of them by the court, each point may have only the future weight of a dictum, though it is perhaps not strictly to be called such.

§ 46. **When precedents may be overruled.** Although courts usually follow the precedents of former decisions, they are not absolutely bound to do so, and sometimes they do not. There may be a variety of reasons for this. Where the precedents are not clear, or have been conflicting, they may be disregarded with considerable freedom. Perhaps this might better be called a case where

no real precedent exists. A real precedent, however, may be disregarded if it has become obsolete through lapse of time and changed conditions. In this respect precedent law differs from statute law, which, in English and American practice remains operative until repealed. More frequently, a precedent may be overruled where a subsequent court is clearly convinced that it was founded upon wrong reasoning; especially when the previous error was due to insufficient argument, mistake as to the previous condition of the law, peculiar circumstances surrounding a case, or to some inadvertence which prevented proper deliberation after full information. Cases are almost never overruled when the result would be either to create or increase criminal liability, or to take away vested property rights. Changes in these matters are left to the legislature.

§ 47. **Precedents from other jurisdictions.** Decisions have binding force as precedents only in the jurisdiction in which they are rendered. Thus, an Illinois court is not bound to follow the precedents established by Indiana or New York courts, inasmuch as these precedents make the law of Indiana and New York only. Where an unsettled question arises, however, for which there are no decisive precedents in Illinois, the courts of that state will give considerable weight to the precedents of other jurisdictions having a similar system of law. Where the precedents of other jurisdictions are conflicting, the fact that the "weight of authority" in number or reputation of jurisdictions is one way, rather than the other, is usually given consideration. The precedents of courts of

well-known strength, like the higher courts of the United States, England, Massachusetts, or New York, have great influence outside of their own jurisdictions. The unwritten law of all our American states, except Louisiana, is derived from the English common law, and is so much the same throughout the country that in every state precedents from other states and from England are freely used in argument and decision by lawyers and judges. United States Supreme Court decisions and English decisions are more frequently cited outside of their own jurisdictions than are those of any of the state courts. A writer upon American law in general may thus draw his illustrations and precedents from any higher court in England, America, or Canada, chosing those most suitable for the purpose, wherever he finds them, and they will be accepted everywhere as entitled to respectful consideration. Throughout this work, for instance, though it aims to state the rules of American law, yet leading English cases are freely used for purposes of illustration and citation. It goes without saying that this wide source from which precedents may be gathered greatly increases the task of American judges and lawyers in thoroughly investigating doubtful questions of importance.

§ 48. **How precedents are collected and cited.** Inasmuch as every judicial decision may create a precedent, the collecting and indexing of such decisions is a matter of great importance. The original trial of a case usually takes place before a single judge, with or without a jury, and points of law involved are argued before and decided by this judge, in the first instance. Such decisions

are seldom reported, as not much deliberation can be had in the heat of a trial. The more important points of law are usually appealed to a higher court, and carefully argued before a bench of judges who decide them after careful deliberation. These decisions of appellate courts are collected and published in book form, there being one or more series of such reports for each state. Formerly the series was commonly published under the reporter's name, as Pickering's reports in Massachusetts, and Johnson's reports in New York. Of late years, however, these series are generally known by the name of the state whose decisions are reported, as Massachusetts reports and New York reports. In citing a case, the name of the case is given, followed by the volume and page of the report. Thus, Gillet v. Phillips, 13 N. Y. 114, refers to the case of Gillet against Phillips to be found in volume 13 of the New York reports at page 114; similarly, United States v. Hudson, 7 Cranch 32, refers to that case in volume 7 of Cranch's reports at page 32. Before 1865, the English reports were all cited by the name of the reporter; since that time they are cited by the name of the court, as 4 Q. B. D. 16, which means volume 4 of the Queen's Bench Division reports, page 16; and latterly they are cited by the year as well as by the court, as [1903] 1 K. B., which means the first volume of King's Bench reports published in 1903.

In addition to the official reports of decisions in this country, there is an excellent unofficial series called the National Reporter System. The states are divided into seven or eight geographical groups, and all of the de

cisions in each group are published in a single series called, for instance, the Northeastern Reporter or the Northwestern Reporter, according to the locality of the states in that group.

At the head of each case in the reports is printed a brief abstract of it, showing what it is about and what propositions of law are laid down in it. This abstract is called a *head-note*. The points of law in each volume are classified under an index-digest at the end of the volume, and, at short intervals, all of the points decided in each state are brought together in a state digest, which is kept up to date by frequent revisions. Similarly, an exhaustive national digest (the Century Digest) has been published and is being continued (the Decennial Digest). By these and similar devices, the enormous mass of judicial precedents is sifted, classified, and placed at the disposal of the legal profession. The magnitude of the task may be imagined when one learns that more than three quarters of a million cases have been classified as judicial precedents in the present national digests. The work has been so well done, however, that it is quite possible, by diligent search, to collect substantially all of the important cases ever decided upon any desired point of law.

§ 49. Statutes. After a statute has been passed by a legislative body, it must be construed and applied by the courts like any other rule of law. Where the language is ambiguous, a definite construction must be put upon it, if required for the decision of some pending case; and this construction then becomes a precedent to be followed, distinguished, qualified, or perhaps overruled, just as a

common law precedent would be. There are even certain rules of law applicable to the construction of statutory law itself, which are ordinarily followed by the courts. See the article on Statutory Construction in Volume XIV of this work.

CONTRACTS.

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CHAPTER I.

PRELIMINARY TOPICS.

SECTION 1. CLASSIFICATION OF RIGHTS.

§ 1. Absolute and relative rights. For the purpose of indicating the relation which contract bears to other rights recognized in law, it is convenient to divide rights into two classes: absolute rights and relative rights (1).

An absolute right is one that accrues to one by virtue of being a citizen of the state, or by reason of the ownership of property, or as incident to a status. Thus every citizen has the right to personal freedom and to reputation. If the owner of property, he has the right to enjoy its profits,

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(1) 1 Bl. Com. pp. 123-129.

and hold it free from injury by others. If he occupies the status of marriage or the head of a family, he has all the rights that are incident to that status (2).

Relative rights on the other hand arise to a person, not by reason of holding property or being a citizen, but by virtue of some agreement to which he is a party, either as a result of an express agreement, or by virtue of some implication of law. Relative rights are measured by the scope of the specific agreement or undertaking, whereas absolute rights come into being not as a result of a specific undertaking but as an incident to the person or property or status of the citizen.

§ 2. **Classification of relative rights.** Relative rights may in turn be divided into those based upon an agreement in the strict sense of the term, and secondly, those obligations that are not based on agreement, but which the law enforces as if they were agreements under the general title of Quasi Contracts, or contracts implied in law.

Obligations based on agreement embrace two distinct classes: (a) agreements containing a promise as a principal part; and (b) agreements not containing a promise as a principal part. The second group embraces all cash sales, gifts, etc. Thus A goes into a store and buys an article which is handed to him in return for the price. While the transaction is the result of an agreement, and the agreement is the basis of the transfer of rights, a promissory obligation does not result. If instead of paying cash, A promises to pay the price at a later day, the

(2) Holland, Jurisprudence (9 ed.), 160, 194, 164.

title to the article passes and B receives for it the promise of A to pay. This transaction falls within the first class of agreements, and is an example of a true contract (3).

Section 2. Historical Development of Contracts.

§ 3. **Primitive law.** The first concern of the primitive law was the protection of the absolute rights of the citizen with respect to his person and property. Hence we find that the law of crimes, which determines the penalty imposed by the state for injuries to the person and property, and the law of torts, which governs the civil liability for injuries to person and property, held an important place in the law, while the law of contracts was still rudimentary. The law of contracts had its beginning subsequent to the Norman Conquest. A long period still was to elapse before the existence of any general notions of a promise or agreement, as a source of civil obligation. Promises were made and performed, no doubt, but they depended for their observance upon religious oaths and forms, and not upon legal sanctions (4).

The relatively slow development of contract law was due also no doubt to the simple needs of primitive society. Commerce, as we know it, did not exist. All trade was merely barter, the exchange of one man's goods for the goods of another. In transactions of this sort, credit had no place, nor was there need for promises as to future acts. Obligations there were which the law recognized, but they depended for their validity on the ceremonies and oaths

(3) Holland, Jurisprudence (9 ed.), 242.

(4) 2 Pollock & Maitland, History of English Law, 182 ff.

that attended their formation, and not upon promises (5). Commerce developed as a result of security to person and property, which the growing stability of the primitive state brought about, and the law of contracts, as we have it, has developed in response to the commercial needs of a highly civilized people.

Section 3. Classification of Contracts.

§ 4. **Contracts and quasi contracts.** A distinction must be drawn between true agreements, the result of voluntary and intentional assent to an obligation, and obligations which the law imposes where one man has profited at the expense of another under circumstances that in justice call for a readjustment of rights. This latter class is known as implied or quasi contracts. The classification of this class of obligations as contracts was due to the inelasticity of the common law procedure. The promise assumed is a mere fiction, designed to give the injured party the benefit of the common law action for the enforcement of contracts. The only point of resemblance to a true contract is this common remedy.

§ 5. **Formal and informal contracts.** With respect to form, true contracts are divided into formal and informal. Formal contracts include recognizances, agreements under seal, and possibly bills of exchange. A recognizance is an acknowledgment of a debt before a court or officer of the court entered on the records of the court. The most common modern examples of this obligation are bonds given for appearance in court or to keep the peace. Judgments

(5) Ibid, 184 ff.

of courts of record are frequently classed as formal contracts, and may be sued upon as contracts, but they are not true contracts since the obligation is imposed by law, and not by agreement of the parties. The characteristic feature of a formal contract is that it derives its force from the formal character of the act creating the obligation (6).

Informal contracts embrace all other classes of agreements whether in writing or oral, and are usually denominated parol contracts.

§ 6. **Express and implied contracts.** Where the contract is written or expressed in terms at the time of making, it is known as an express contract.

When the parties have not framed their promises in express terms, and it is necessary to consider not only their statements, but their conduct as well in determining their obligation, the contract is said to be implied in fact. When the obligation is imposed by law without reference to the specific undertaking of the parties, it falls within the class known as quasi contracts already referred to.

§ 7. **Executed or executory contracts.** Before the parties have completed performance under a contract, it is known as an executory contract; when performance is complete, it is known as an executed contract. An executed contract has no legal significance. The purpose of the agreement is fulfilled when performance is complete and the contract expires. Where one party has performed on his part, the contract is of course executed as to him, but executory as to the other party.

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(6) Harriman, Contracts (2 ed.), Sec. 4.

§ 8. **Bilateral and unilateral contracts.** "A bilateral contract is one which is to be performed on each side at some future time" (7). Thus A promises to sell a watch to B for $50, and B promises to pay $50 therefor. The contract is executory on both sides. "A unilateral contract is one in which one of the parties performs at the moment when the other promises to perform" (7). Thus, if B promises to pay A $50 if A will deliver a watch to B, and A delivers the watch, A obtains the promise of B to pay $50 in return for the watch. The contract is executed as to A and executory as to B. Insurance policies, debts, and promissory notes are examples of unilateral contracts.

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(7) Langdell, Summary of Contracts, Sec. 183.

PART 1.

FORMATION OF CONTRACTS.

CHAPTER II.

OFFER AND ACCEPTANCE.

§ 9. **Contract defined.** A contract in the modern sense has been defined as an agreement containing a promise enforceable in law (1). An analysis of this definition will show its scope and limitation. The term "agreement" implies that there are at least two parties involved, since one party can not agree to a proposition unless it is made to him by another. The term "agreement" further implies that one party makes a proposal or offer to which the other party assents, hence agreement is reducible to offer and acceptance.

§ 10. **Agreement must contain a promise.** This agreement must be something more than assent to some general proposition such as: "The world is round." It must contain a promise. Thus if A says to B: "The world is round," and B replies: "I assent to that," we have an agreement, but it is of no legal significance. If, however, A says to B, "I will promise to do thus and so, if you will promise to do thus and so," and B assents, we have an agreement which contains promises from A to B and B to A.

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(1) Wald's Pollock, Contracts (Williston's ed.), 7.

§ 11. **Promise must be enforceable in law.** It will be observed from the definition that a contract is not only an agreement containing a promise, but it must be one that is enforceable in law. Many agreements which contain promises are of no validity in law for the reason that they are not intended by the parties to create legal obligations. Ordinarily, social agreements are of this nature. Thus, if A invites a friend to dinner, and he accepts, we have an agreement in proper form, but the failure to attend the dinner or a failure to give the dinner involves no legal consequence. Again, the parties may have entered into an agreement which in form is legal, but which the parties do not intend to be binding. This class of cases is illustrated by Keller v. Holderman (2). A gave his check for $300 to B for an old silver watch worth perhaps $15. B presented the check to the bank and it was not paid; he then brought suit against A. It appeared that the whole transaction was a joke, and neither party intended a legal obligation. Accordingly, the court dismissed the suit. The rule laid down in this case applies to all cases where the parties do not intend a legal obligation, although in form they have created one.

§ 12. **Motive is not material.** The motives which induce parties to make a contract are as a rule not material as long as they intend to make a binding agreement. This is illustrated by the celebrated case of Williams v. Carwardine (3). In this case one A offered a reward for information leading to the conviction of a murderer. B

(2) 11 Mich. 248.

(3) 4 B. & Ad. 621.

gave the information and brought suit to recover the reward. It was alleged by A that B gave the information because of a desire to be revenged for a wrong done to B by the murderer, and not to secure the reward. But the court held that this was immaterial, since it appeared that the information was given in response to the offer of a reward with intent to claim the same. Parties enter into contracts for a variety of reasons, and in accordance with the rule of the above case, the law is not concerned with the motive, but considers only the question whether or not an offer has been made and accepted.

§ 13. **Meeting of minds.** In order that there may be an agreement, it is necessary that the minds of both parties shall coincide with respect to every material term of the alleged agreement. If one party has in mind one thing as the subject matter of a contract, and the other party has in mind a different thing, it will be impossible to say that they are in agreement. Thus, in the case of Raffles v. Wichelhaus (4), the agreement was to buy and sell a cargo of cotton to arrive by the ship "Peerless" from Bombay. It appeared that there were two vessels named "Peerless," one sailing in October and one in December, and the plaintiff had one vessel in mind, and the defendant, the other. The court accordingly held that the parties had never agreed on the same thing and there was no contract.

Again the parties may fail to agree by reason of the fraud or deceit practiced upon one of the parties by the other party, so that one party signed an entirely different

(4) 2 Hurl. & Colt. 906.

agreement, or did an entirely different act from the one he intended. In Foster v. MacKinnon (5) A signed an instrument represented by B to be a guaranty similar to papers he had signed on previous occasions. As a matter of fact the instrument signed was a bill of exchange. The jury found that A was not negligent. It was held that A was not liable, since he could truthfully say that he had never agreed to become liable on a bill of exchange. If, however, A had been negligent in signing, that is, if he had signed the instrument without investigation as to its character, and it had afterwards come into the hands of a person who had purchased it in good faith, the defendant would be liable, not because of a contract, since there would be none, but because his negligence had made possible the loss to the present holder.

The same rule is illustrated in cases where a party intends to make a particular contract, but thinks he is dealing with a person other than the one with whom he makes the contract. The courts hold in these cases that a valid contract exists provided he deals face to face with the party. Thus, A comes to B and states that he is C, a man of established credit, when in fact he is not. B, relying on the statement, sells goods to A on credit, which A sells to D, who buys in good faith. B can not recover the goods from D, because he did intend to sell to the very person with whom he made the agreement, although he was induced to sell to him by reason of the belief that the person was C. He, therefore, is not in a position to say as in the preceding case that he did not make the contract, since he

(5) L. R. 4 C. P. 704.

did intend to sell to A (6). If, on the other hand, A had written to B making exactly the same representation that he was C, and B had sent the goods addressed to C, which A came into possession of, B could recover the goods since he never intended to make a contract with A, and never had A in mind when he made the agreement or when he shipped the goods (7).

Where one party had previously dealt with another as the agent of a third person, and an agreement is now entered into between the parties in which no representation is made that the party is acting as agent although the other party assumes that he is so acting, nevertheless a contract will arise, if it is clear that the person who was thought to be acting as agent did not know of the delusion under which the other party was laboring and consequently did not purposely mislead him (8).

§ 14. When a knowledge of terms of offer is presumed. A person accepting an offer is charged with knowledge of the terms of the offer, and can not set up his ignorance of them if reasonable means were adopted by the offeror to bring them to his attention. This principle is illustrated by the case of Fonseca v. Cunard Steamship Company (9). A passenger bought a ticket which contained on its face terms limiting the liability of the carrier for the baggage of the passenger. It appeared that the passenger did not read the conditions, yet the court held he must be

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(6) Edmunds v. Merchants' Despatch Transportation Co., 135 Mass. 283.

(7) Cundy v. Lindsay, L. R. 3 App. Cas. 459.

(8) Stoddard v. Ham, 129 Mass. 383.

(9) 153 Mass 553.

assumed to have known them since they were printed in full on the face of the ticket, and he could not set up that he had not read the terms of what amounted to an offer.

§ 15. **Actual meeting of minds not required.** All these cases serve to show that, while the law is generally stated in the form that there must be an actual meeting of minds of the parties to make a contract, the term is not to be taken in its strict literal sense. Since in the case just stated it is apparent that the minds of the parties did not actually meet, yet as the offeror had made his offer in definite terms, and had taken reasonable steps to bring them to the attention of the offeree, the law presumes that the offeree when he accepted the offer, accepted on these terms.

§ 16. **Offer must be communicated.** It is impossible for a person to assent to something of which he is ignorant, and it is equally impossible for a person to accept an offer of which he has no knowledge, although it may appear that he has done the very act for the doing of which the offerer promised to pay. Yet if it appears that he was ignorant of the offer at the time or that he did not do the act with the intention of accepting the offer, no contract arises. In Fitch v. Snedaker (10), A offered a reward of $200 to any person or persons giving information leading to the arrest and conviction of a murderer. B gave the information leading to the arrest before he knew of the offer of a reward, and it was held that he could not recover since it appeared that he had not acted in reliance

(10) 38 N. Y. 248.

upon the offer. The same rule is illustrated by numerous cases growing out of the bounty system during the Civil War. It was common for cities and counties to offer a bounty for each man who would enlist to fill the quota of a particular city or county under the draft acts. The bounty was recovered only where the person enlisted with knowledge that a bounty was offered (11). Acceptance of the offer is established by showing that the act was done in reliance on the offer. If the party doing the act disclaims any intent to accept the offer, by so doing no contract arises (12).

§ 17. **Where the contract arises.** It is important to determine where the contract arises since the construction of its terms will ordinarily depend upon the law of the state where the contract arose. If parties are dealing face to face when the agreement is made the place where they are at the time will be the place of contract. If, however, the contract is made by letters or by telegraph or telephone, a different situation arises. Suppose for example, A in New York writes to B in Chicago offering to sell certain goods at certain prices, and B on receipt of the letter writes a letter accepting the offer, when does the contract arise, and where does it arise? According to the established rule in such cases the contract arises as soon as the letter is put into the mail in Chicago, properly addressed and stamped. Accordingly the contract is completed in Illinois (13). This result is reached by assuming that A

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(11) Mayor of Hoboken v. Bailey, 36 N. J. L. R. 490.

(12) Hewitt v. Anderson, 56 Cal. 476.

(13) Dunlop v. Higgins, 1 H. L. Cas. 381.

by mailing his letter made the postoffice department his agent to transmit his offer and receive a reply. Accordingly when B mails his acceptance in Chicago he is regarded as having put his answer into the hands of A's agent, which in law is the same as if he had actually handed it to A in person. The force of this reasoning is weakened when we consider another class of cases where the person making the offer in writing says to the offeree that, if the latter accepts, he will do some act to indicate it, as by placing a letter under a stone. If the offeree does as directed, the contract arises as soon as the act is completed (14). This class of cases indicates that the agency theory is not correct. The offeree is bound when he does the act which the offeror indicates will constitute the acceptance of the offer.

Applying this theory when an offer is sent to one at a distance, the offeror impliedly authorizes the offeree to use the ordinary means of communication, and if the offeree deposits a letter or sends a telegram properly addressed, he has completed the act which the offeror recognizes as an acceptance and if the telegram (15) or letter is not received, the risk falls on the offeror and not on the offeree. In the case of contracts made by telephone, the same rule applies as in the case of letters or telegrams, and accordingly the contract arises as soon as the offeree has spoken the words into the transmitter which constitute an acceptance (16). The minds of the parties

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(14) Tayloe v. Merchants' Fire Ins. Co., 9 How. 390.

(15) Bank of Yolo v. Sperry Flour Co., 141 Cal. 314.

(16) Trevor v. Wood, 36 N. Y. 307.

then legally meet although they do not actually meet when the offeree's act is completed.

§ 18. **Acceptance must be communicated.** The acceptance of an offer must be communicated to the offeror. As just indicated, the acceptance is communicated in point of law as soon as the offeree has done the act indicated by the offeror as constituting an acceptance. A mere determination to accept an offer is not enough. In Felthouse v. Bindley (17), A offered to sell a horse to B. There was a misunderstanding as to the price and B wrote to A saying that he would split the difference. A determined to accept but did not communicate his intention to B. The court accordingly held there was no contract. Thus, if a person to whom an offer has been made writes a letter of acceptance which he carries in his pocket or leaves on his desk. No contract arises. He must do the overt act contemplated by the offeror, and put his acceptance out of his possession and in the course of transmission to the offeror.

§ 19. **Mere silence not an acceptance.** Mere silence on the part of the offeree will not constitute an acceptance ordinarily. Thus if A writes to B: "I have shipped to you certain goods at certain prices, and unless I hear from you shortly, I will assume you have accepted them on these terms," B is not bound to notify A that he will not take the goods and he can not be compelled to accept them or pay for them. Of course, if he does take and use the goods, it would constitute an acceptance of the offer,

(17) 11 C. B. (N. S.) 869.

and would render him liable (18). There are exceptions to the above rule growing out of prior dealings of the parties. Thus in Hobbs v. Massasoit Whip Co. (19), A was in the habit of shipping eelskins to B, a manufacturer of whips, who was accustomed to accept and pay for them. In this particular instance B refused to accept the consignment of skins, and failed to notify the shipper, and the skins were spoiled standing in the cars. B was held liable for their value on the ground that the previous course of dealing between the parties justified A in sending the goods in this manner, and expecting a reply, if they were not accepted. The situation in this case is exceptional, however, and clear evidence is always required to show a course of dealing sufficient to justify such an assumption on the part of the offeror. In its absence, the general rule that mere silence will not constitute an acceptance must prevail.

§ 20. When actual receipt of acceptance is necessary. The general rule, that a contract made by mail or telegraph arises as soon as the acceptance is put in course of transmission, is based upon usage and the supposed intent of the parties, and therefore evidence will be received to show that in a particular case the parties intended a different rule to apply. Thus if the offeror stipulates that the acceptance must be received by him, the contract will not arise when the letter is mailed, but only when it has actually been received as stipulated. Thus A wrote to B offering to lease certain premises to him at a certain stip-

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(18) Bruce v. Pearson, 3 Johnson (N. Y.) 534.

(19) 158 Mass. 194.

ulated rental, adding: "If I do not hear from you by the 15th, I shall consider the offer refused." B telegraphed an acceptance which was never received. It was held there was no contract since the offeror clearly stipulated for the actual receipt of the acceptance (20). If the clause, "unless I hear from you by the 15th" had been omitted, the contract would have arisen although the telegram had never been received (21).

Again the circumstances under which the offer is made may show that an actual receipt of the acceptance was intended. In the case of Haas v. Myers (22), A and B agreed to purchase a herd of cattle in Montana if prices were favorable. B was to go to Montana to inspect the herd and it was agreed that if satisfied with the herd, both as to condition and prices, he was to wire A, "Yes;" otherwise, "No." If "Yes," then A was to wire the price necessary for a one-third interest, which amount was to be deposited in a bank to the credit of B. B telegraphed to A, and A replied, but A's telegram was never received. It was held that inasmuch as B was to do certain acts on receipt of A's telegram, it was necessary that such telegram be actually received by him, and, if not so received, the contract did not arise.

§ 21. **Acceptance must be responsive to the offer.** The acceptance of an offer must be responsive to the offer. Thus if A writes to B, "I will give you $500, if you will agree to build a fence around my property," and B re-

(20) Lewis v. Browning, 130 Mass. 173.

(21) Household Ins. Co. v. Grant, L. R. 4 Ex. Div. 216.

(22) 111 Ill. 421.

plies, "I accept," a contract is made. But if B instead of replying starts to build or actually builds a fence, it would not be an acceptance since the offer calls for a reply and not an act. If, on the other hand, A had said, "I will give you $500 on your completing a fence around my property," no contract would arise by B's writing a letter accepting the offer, since A is asking not for a promise, but for an act, i. e., building a fence. In other words, where the offer contemplates a unilateral contract, the offeree cannot turn it into a bilateral contract by giving a promise (23).

§ 22. **Notice of acceptance: Unilateral contracts.** Where the acceptance of an offer is an act, notice that the act has been done is not necessary, since the contract arises as soon as the act is completed (24). Thus in the illustration above the contract would arise as soon as the fence was built. To this rule there are some apparent exceptions growing out of commercial usage. Thus where A says to B, "If you will sell certain goods to C, I will guarantee that he will pay for them," this offer would be accepted by selling the goods to C in reliance on the guaranty, but the law requires further that B notify A that he has acted on the offer. The giving of the notice is not an acceptance of the offer, however, but it is an additional act which the law requires in deference to commercial usage. If A is to be responsible for C's debt to B, he should be notified that the debt has been incurred in reliance on his promise in order that he may protect him-

(23) White v. Corlies et al., 46 N. Y. 467.

(24) First National Bank v. Watkins, 154 Mass. 385.

self. Hence, if knowledge comes to him from any other trustworthy source that goods have been sold in reliance on his credit, he will be liable (25). There are some authorities contrary in reasoning to this view, if not to the result reached (26). In these cases the court seems to take the view that no contract arises until the notice is sent. This view is contrary to the accepted rule in unilateral contracts.

§ 23. **By whom offer must be accepted.** Where an offer is made to a specific person, that person alone can accept. Thus, where A sent an order to B for goods, which order was filled by C who had bought out B's business unknown to A, it was held that no contract had been made since the offer was not made to C but to B (27). If the offer is made to the public generally, then any member of the public who complies with the terms of the offer becomes a party to the contract. The most common illustration of this sort of an agreement is an offer for a reward. A advertises in the newspaper or by posted notice that he will pay a reward to any one furnishing information leading to the recovery of a lost article. Any member of the public furnishing information or returning the article can recover the reward if he furnishes the information or returns the article with knowledge of, and in reliance upon the offer (28).

§ 24. **Certainty of terms: Advertisements as offers.**

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(25) Bishop v. Eaton, 161 Mass. 496.

(26) Davis Sewing Machine Co. v. Richards, 115 U. S. 524.

(27) Boulton v. Jones, 2 H. & N. 564; Boston Ice Co. v. Potter, 123 Mass. 28.

(28) Anson, Contracts (Huffcut's 2 ed.) 54.

Not all proposals made in the form of offers are to be so regarded. Their meaning depends on the circumstances under which and the purpose for which they are made, and also the general understanding of business custom. Ordinary advertising matter furnishes the common illustration. A merchant advertises his wares in a newspaper setting out the articles to be sold and the prices. The advertisement will not be construed as a specific offer, but merely as an attempt to call attention to the wares of the merchant and to show the bargains he is offering, but he is not bound to sell the articles thus advertised to applicants although they tender the price. Circular letters sent out to the trade by a wholesale merchant fall within the same rule. In Moulton v. Kershaw (29), A, a salt dealer, sent a circular letter to B, a retail merchant, as follows: "In consequence of a rupture in the salt trade we are authorized to offer you Michigan fine salt in full car load lots delivered at 8 cents. This is a bargain. Will be pleased to have your order." B telegraphed for 200 barrels, which A refused to deliver. In a suit on the alleged contract, the court held that no contract was made since the letter to A was merely a circular advertising his wares, and not intended as an offer.

§ 25. **When advertisement is an offer.** It must not be presumed from the above case that it is impossible to make an offer by advertisement or circulars. It is possible, provided it is clear that the author intends the circular or advertisement to be an offer. Thus in Carlill v. Carbolic Smoke Ball Co. (30), the company advertised

(29) 59 Wis. 316.

(30) L. R. 1 Q. B. (1893) 256.

that they would pay £100 reward to any one who used their smoke ball for three times daily for two weeks, and contracted the prevailing influenza. A purchased a ball and used it as directed for that period, contracted influenza, and then brought an action to recover the reward. It was held a valid contract. The court distinguished the case from the ordinary advertisement by saying that the Smoke Ball Company evidently intended it to be an offer because they expressly stated that they had deposited £100 in a certain bank as evidence of their sincerity in the matter, which statement would justify the belief on the part of the plaintiff that this was not an ordinary advertisement.

§ 26. **Clear evidence of intent to make an offer is required.** The law requires that it be very clearly shown that the party intended to make an offer in a particular case. Where an inquiry is addressed to the owner of property as to whether he will sell the property and at what price, the reply of the owner, stating the price, is not to be regarded as an offer which will ripen into a contract if accepted by the other party. Thus in the case of Harvey v. Facey (31), A telegraphed to B: "Will you sell Bumper Hall pen? Telegraph lowest cash price." B replied: "Lowest price for Bumper Hall pen £900." A immediately telegraphed accepting the alleged offer. The court held that no contract was made here since B's telegram was not an offer. So also a statement made in the form of the offer may be made under such circumstances as to indicate no offer was intended. Thus in the case of

(31) L. R. App. Cas. (1893) 552.

Stamper v. Temple (32), A, who had just been wounded and his son killed in a shooting affray, exclaimed, "I will give $200 for the arrest of our assailants." B afterwards assisted in the arrest of the assailant and sued for the recovery of the reward. It was held that A's statement did not constitute an offer in the light of the circumstances, since he was laboring under great excitement, his son had just been killed and he himself had been seriously wounded, and his statement must be regarded as a mere exclamation.

§ 27. **Binding force of agreement preliminary to formal contract.** Where the parties have made a preliminary agreement with the intention that a formal contract shall be drawn up, either party may retire before the formal agreement is executed, without liability, if it appears that all the terms of the proposed contract have not been agreed upon. It would be unjust to enforce this incomplete agreement, which does not represent the final decision of the parties, and which may come to naught through failure of subsequent negotiations. Thus in the case of Page v. Norfolk (33), A offered $145,000 to B for the latter's brewing business, subject to detailed contract, payment to be $95,000 in cash, balance stock in a company to be organized to operate the property. B wrote accepting the offer but afterwards refused to proceed. It was held no contract was made, since the essential terms as to the formation of the company, value of stock, capital of the company, etc., were still uncertain.

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(32) 6 Humph. (Tenn.) 113.

(33) 70 L. T. R. (N. S.) 781.

If, however, it appears that the parties have agreed upon all the essential terms of the contract, and nothing remains to be done except to embody those terms in a formal contract, the general rule is that the party can not withdraw (34). Even where the contract is evidently incomplete, if the parties proceed to treat it as binding, and perform under it, they will be held to the bargain which results from their acts, rather than their words (35).

§ 28. **Acceptance must be in the terms of the offer.** The acceptance of an offer must be in the terms of the offer or it will operate as a rejection of it. The offeror has the right to make an offer in any terms he sees fit, and the offeree, if he desires to enter into a contract with him is bound to accept in these terms. Thus if A writes to B offering to sell B certain land and B replies accepting the offer, enclosing conditions of sale as to time and place of delivery of the deed, this will operate as a rejection of the offer. When the offer is silent as to place of delivery of the deed and payment of purchase price, the law requires payment at the residence of the vendor, and any change in the place of delivery made in the acceptance by the offeree is the introduction of a new term and rejects the offer (36). If, however, the offeree merely suggests a place of delivery and it is clear from his language that he intends it merely as a suggestion and not as a condition of his acceptance, the contract will stand (37). When the acceptor embodies in his acceptance terms which the law

(34) Shepard v. Carpenter, 54 Minn. 153.
(35) Cases above. Clark, Contracts, 62.
(36) Baker v. Holt, 56 Wis. 100.
(37) Matteson v. Scofield, 27 Wis. 671.

will imply anyway, the acceptance is not conditional and will stand. To refer to the illustration above, if an offer is made for the purchase and sale of land by A residing in X and B residing in Y, and B replies suggesting that the deed be delivered at X, the residence of A, and the purchase money paid there, he is simply stating in terms what the law would imply, and therefore is not adding any new terms to the agreement.

§ 29. **Effect of counter offer.** If the offeree embodies terms in his acceptance which are not in the offer, he not only rejects the original offer, but in turn makes an offer to the other party which he in turn may accept or reject. It would seem that the offeree must consider the offer as made. He can not withhold action on the offer, and make an offer himself relative to the same subject matter without rejecting the original offer. Thus if A says to B, "I will sell you my cow for $100," and B replies, "I will consider your offer, but I now offer you $75 for the cow," obviously this would operate as a rejection of the original offer, since the offeror has a right to insist upon the consideration of his offer prior to any further dealing with the same subject matter (38).

§ 30. **Revocation of the offer.** An offer may be withdrawn at any time prior to its acceptance. A revocation to be effective must be actually communicated to the offeree. A mere decision on the part of the offeror to revoke, or even a letter or telegram of revocation, duly posted, will not be effective until received, and if the

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(38) Minneapolis & St. Louis Ry. v. Columbus Rolling Mill Co., 119 U. S. 149.

offeree accepts the offer by duly posted letter or telegram, or by doing any other act which the offeror designates as an acceptance, a contract will arise even though the revocation is received by the offeree before the offeror has received the acceptance. Thus, in the case of Byrne & Co. v. Van Tienhoven (39), on October 1st A offered to sell B a quantity of tinplate. On the 8th of October A wrote to B revoking the offer. On the 15th of October B cabled an acceptance. It was held that a contract arose the moment the cablegram was filed for transmission, although the letter of revocation had been mailed a number of days before, yet as it had not yet come to the attention of B, it was ineffective as a revocation. A revocation may be made either in terms or by conduct which renders performance impossible. Thus, if A has made an offer to sell land to B, a sale of the land to X will constitute a revocation if brought to the notice of the offeree prior to acceptance by him.

§ 31. **Revocation where offer is to remain open for a definite time.** Even where the offeror expressly states that the offer will remain open for a definite time, nevertheless he is at liberty to withdraw it at any time prior to acceptance. Thus in Offord v. Davis (40), A offered to guarantee all the bills of D & C which should be discounted by B, within a year. Before any bills were discounted, A notified B that he withdrew his offer. A subsequent discounting of D & C's paper by B imposed no liability on A, since the offer was withdrawn before acceptance.

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(39) L. R. 5 C. P. D. 344.

(40) 12 C. B. (N. S.) 748.

§ 32. **Options.** The only effect of a promise to keep the offer open is to determine how long the offer will remain open if not previously revoked. If, however, the offeree gives something of value for the promise to keep the offer open, a contract arises, and a revocation of the offer will constitute a breach, rendering the offeror liable in damages. Agreements of this character are known as options.

§ 33. **Revocation of offers to public.** Where the offer is made to the public generally, as in the case of rewards, it would be impossible to give personal notice of withdrawal to every one who had knowledge of the offer. Accordingly, it has been held that such an offer may be withdrawn in the same public way in which it is made. Thus, in Shuey v. United States (41), it was held that offers of reward made by the United States government for the apprehension of the assassins of President Lincoln could be withdrawn by publication in the same manner that the original offer was made, and consequently a person who performed an action in reliance upon the offer after such publication could not recover.

§ 34. **When revocation is communicated.** It is not essential, apparently, that the offeree know of the revocation from the offeror directly. If he receives information through a reliable source that the offer has been revoked, the offer is regarded as revoked. Thus in the case of Dickinson v. Dodds (42), A offered to sell land to B, the offer to remain open until Friday. On Thursday B

(41) 92 U. S. 73.

(42) L. R. 2 Ch. Div. 463.

learned through X that A had sold the land. B at once left a letter at A's residence accepting the offer and the next day, Friday, accepted in person. It was held that no contract arose since the offer was revoked prior to its acceptance. This rule, however, must not be stated too broadly since the offeree is not bound to regard mere rumor. It must in every case appear that the information came so directly as to make its truth reasonably certain. The soundness of a rule that recognizes anything short of direct notice of revocation by the offeror to the offeree has been questioned (43).

§ 35. **Termination by lapse of time.** Where an offer is not limited in terms to a fixed time, it will not continue indefinitely. In such cases the offer is said to lapse on the expiration of a reasonable time. What is a reasonable time is a question dependent on the facts of each case. The court will take into consideration the occasion of the offer, the subject matter, and the language used by the parties in determining this question. Thus in Loring v. Boston (44), the city of Boston offered a reward in 1837 for the conviction of persons guilty of setting incendiary fires. A caused the arrest of a person who had set an incendiary fire in 1841 and claimed the reward. It was objected that the offer of reward must be regarded as withdrawn since it appeared that at the time of the offer in 1837 there had been a number of incendiary fires in the city and the reward was offered in the face of the dangers threatened and was intended to secure the conviction of

(43) Wald's Pollock on Contracts (Williston's ed.) 32.

(44) 7 Met. 409.

the perpetrator of the fires of that period. The court adopted this view and held that the offer had lapsed. A different result was intimated where there is a standing ordinance offering rewards for incendiaries.

§ 36. Period of offer determined by the subject matter. The period of the offer is also determined by the subject matter of the contract. Thus in the case of Minnesota Linseed Oil Co. v. Collier White Lead Co. (45), an offer to sell linseed oil was made by A in Minneapolis to B in St. Louis. The offer was by wire and sent at 9:15 o'clock p. m., Saturday, July 31st. It was delivered to B between eight and nine o'clock on Monday, August 2nd. On Tuesday, August 3rd, at 8:53 o'clock a. m., B wired an acceptance. It was held that the offer was revoked by lapse of time. In reaching this conclusion the court considered the fact that the subject matter of the contract was an article which at that time was fluctuating rapidly in value and therefore twenty-four hours' delay after the receipt of the despatch was an unreasonable delay. The fact also that the offer is sent by telegraph tended to indicate the urgent character of the transaction and make the period during which the offer was presumed to stand relatively short. An acceptance by less speedy means of communication would also be regarded as an unreasonable delay. Thus where an offer is sent by wire an acceptance by mail would not comply with the implied terms of the offer.

Where, however, the subject matter of the article of sale, such as land, does not fluctuate in value and there is

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(45) 4 Dill. 431.

nothing in the language of the parties or the circumstances under which the offer is made to indicate that the transaction is urgent, a considerable period of time may elapse without raising the implication that the offer has been withdrawn. Thus, in Ramgate Victoria Hotel Co. v. Montefiore (46), A applied for an allotment of shares in the company on June 8th, and the allotment was made on November 23rd. The court held that the allotment which constituted an acceptance of the offer was too late, but also indicated that a mere matter of a month or two would not have been an unreasonable delay in accepting the offer.

§ 37. **Answer by return mail.** Frequently the offer stipulates for an answer by return mail. Such stipulation is usually considered not to mean the first mail that goes out after the offer is received. A letter posted on the day the offer is received complies with this rule. Thus in Dunlop v. Higgins (47), the offer was received about noon, stipulating reply by return mail. The first post left at two o'clock in the afternoon, and another post left at six o'clock. It was held that a letter posted in time for the six o'clock post was in compliance with the terms of the offer. It may well appear in certain cases that the term "by return mail" is used in a mere formal way and is not intended to be literally complied with.

§ 38. **Effect of death.** It would seem to follow from the rules previously laid down as to the prerequisites of legal agreements that the death of the offeror before the

(46) L. R. 1 Ex. 109.
(47) 1 H. L. Cas. 381.

offer is accepted would revoke the offer, and such is the rule. The offer is said to be terminated by operation of law and no notice to the offeree is essential as in the ordinary case of revocation. Thus in the case of Jordan v. Dobbins (48), where A offered to guarantee the payment of all goods sold by B to C for a year, it was held that the offer was terminated by the death of A, and B could not hold X, who was the executor of A's will, for bills incurred after A's death, although B extended the credit in ignorance of the death and in reliance on the offer. Cases of this character seem to be in conflict with the rule previously stated that a revocation is not effective unless actually brought to the attention of the offeree. By some courts the ruling is justified on the grounds that death is public in its nature, and all persons are charged with notice of it, and accordingly the offeree when he accepts an offer after the offeror's death is presumed to know of the death. This explanation is hardly consistent with the facts, however. The rule is based on the theory that an offer cannot exist without personality behind it and when the personality disappears the offer must of necessity disappear. There seems to be no pressing commercial necessity which would justify the court in applying any other rule. The converse case is also true, namely, that the death of the offeree terminates the offer. Since the offer was made to this specific person and not to the public, the death of this specific person operates to destroy the offer.

§ 39. **Effect of insanity.** The same rule generally prevails in the case of insanity of the offeror. Thus, in the

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(48) 122 Mass. 168.

case of Beech v. M. E. Church (49), the defendant's testator had subscribed to the fund for the erection of a church. Shortly after the subscription was made and before it was accepted by the church, the testator became insane and so continued up to the time of his death. It was held that insanity operated as a revocation of the offer on the same ground as in the case of the death of the party. The courts are not unanimous on this proposition, however, and the English courts hold that if the offeree accepts the offer while ignorant of the insanity of the offeror the contract would be enforced (50).

In the United States the majority of the courts hold that if the offer has been accepted and performance has been completed to the point where the parties can not be put back in their original position, assuming that the parties have acted in good faith ignorant of the insanity, the contract will stand (51). This view of the American courts is not to be supported on principle—either the contract should be considered good or bad. Assuming that the parties have acted in good faith, the enforceability of the contract should not depend on facts subsequent to the making of the agreement.

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(49) 96 Ill. 177.

(50) Imperial Loan Co. v. Stone, L. R. 1 Q. B. (1892) 599.

(51) Anson, Contracts (Huffcut's 2 ed.), 154, note.

CHAPTER III.

CONSIDERATION.

§ 40. **Consideration.** Although the minds of the parties may have met with reference to a common purpose, still the agreement will not be a legal contract unless it successfully meets another test which the law imposes. The law requires that every enforceable promise, except promises under seal (which will be dealt with hereafter), should be supported by a consideration. This doctrine is universally accepted at common law, and in the case of Rann v. Hughes (1), the House of Lords, the highest court of appeal in England, laid down the rule that all contracts, whether oral or in writing, must be supported by a consideration unless under seal. By consideration is meant something of value received or given at the request of the promisor in reliance upon and in return for his promise. The option contracts referred to will serve as an illustration of the application of this rule. Thus, if A offers to sell B a piece of land for a fixed sum of money, and B asks for time to consider the offer, and A promises he may have it, nevertheless A may dispose of the land to others, since his promise to B is a mere naked promise unsupported by any consideration. If, however, B pays a sum of money to A in return for his promise to keep the offer open for a fixed period, a contract arises which is

(1) 7 Term Repts. 350.

supported by a consideration and A cannot then afterwards withdraw his offer. The money paid by B is known in law as a consideration.

§ 41. **Origin of doctrine.** This doctrine of consideration is peculiar to the common law and is unknown in the same form in any other system of law. Its precise origin is surrounded in considerable mystery and not until a rather late period was it accepted as a general rule. Thus, as late as 1765, in the case of Pillans v. Van Mierop (2), Lord Mansfield seemed to think that a consideration was required merely as a matter of evidence, and if, therefore, the contract was in writing or was established in some other recognized manner no consideration would be required. This doctrine has, however, been completely abandoned.

As a result of the investigation of legal scholars (3), the generally accepted view is that the doctrine of consideration had its origin in procedure. As commonly stated by text-writers a consideration may be either a benefit to the promisor or a detriment to the promisee and this alternative form of statement serves to indicate the probable twofold origin of the doctrine itself. In the common law action of debt, it was assumed that the debtor had money or chattels belonging to the creditor, either because he had received so much money from the creditor or something which was admittedly equivalent to the money. In the case of a sale of goods, the buyer acquired property in the goods and the seller acquired

(2) 3 Burr. 1663.

(3) Holmes Common Law, 247; Ames' History of Assumpsit, 2 Har. L. Rev. 1, 53; Hare on Contracts, 117.

property in the *agreed price.* The action was, therefore, to recover this property and not a suit on a promise. In order to succeed it was necessary to show that the debtor had received an equivalent or recompense—known by the term quid pro quo. From this necessity comes the statement that a consideration is a benefit to the promisor.

On the other hand, in the action on the case in assumpsit, it was immaterial whether the promisor received a benefit or not as a result of his undertaking. If the promisor had assumed an active duty towards the promisee either by promise or otherwise, and the promisee had incurred risk or trouble or expense in reliance on the assumption, the promisor was liable. The promise was originally immaterial. The important thing was the assumption of a duty by the promisor and the detriment suffered by the promisee in reliance thereon. Hence, the second form of the definition that a detriment to the promisee is a consideration.

Although the old form of statement is still adhered to by the text-writers, nevertheless, it is quite clear from an examination of the authorities that the rule may be stated in this form: *A consideration must be a detriment to the promisee.* Whether or not the promisor has derived any benefit from the act of the promisee is immaterial, but if it appears that the promisee has given up something of value in reliance on the offer, he can succeed in his action, to establish a contract; otherwise, not.

§ 42. **Motive and consideration.** A distinction must be drawn between motive and consideration. There may be a great variety of reasons which induce parties to enter

into an agreement. Those reasons ordinarily would have no bearing on the validity of the agreement itself. The consideration for a contract differs from the motive in that the latter is the cause for entering into the agreement, whereas a consideration is the thing given by the promisee in reliance on the promise. This distinction is illustrated by the case of Thomas v. Thomas (4), in which A's husband, desiring that further provision be made for A, on his death bed requested B, who was the executor of his estate, to make conveyance to A of the use of a certain dwelling house. In furtherance of this request B agreed that A should have the house and A promised to pay £1 per year rent. B refused to carry out the agreement and plaintiff brought the action for breach of contract and recovered, the court holding that while the motive back of the entire transaction was to carry out the last wish of the husband, yet that would not sustain the undertaking, but the £1 a year which A was to pay was a sufficient consideration to support the promise. And again, in the case of Philpot v. Gruninger (5), A and B were indebted to C. C subsequently agreed to become a member of a syndicate formed by A, B, and others for the promotion of certain oil wells, and to transfer certain property to the syndicate, which transaction he never carried out. On the same day, A, B, and D gave C their note covering the original debt to C. C brought suit on the note and the defendants set up that there was no consideration for the note on the ground that C had

(4) 2 Q. B. 851.
(5) 14 Wall. 570.

not carried out his promise with respect to the syndicate. All this was rejected, however, the court holding that the consideration consisted in the settlement of the old claim held against A and B, and while the motive which actuated A, B, and D in giving the note may have been to induce C to enter into the syndicate, yet it did not appear that the two transactions were related or dependent on each other.

§ 43. **Adequacy of consideration.** Consideration is a legal detriment suffered by the promisee at the request of the promisor. To constitute legal detriment it is necessary that the thing surrendered be something which the promisee has the right to retain in his possession. Whether the thing delivered or the act done is of any intrinsic value or results in a benefit to the promisor is immaterial. Indeed, it may have very slight value in comparison with the thing promised by the promisor and still be sufficient to support the promise. Thus, if A gives B $5 in return for B's promise to deliver a horse worth $200, the contract would be good. The promisor has an absolute right to determine upon what consideration he will consent to be bound (6). If, however, the owner of the horse claimed he was induced to promise by reason of the false representations of A, or in consequence of misrepresentations or undue influence, the inadequate price could be shown as evidence of fraud. Standing alone it will not constitute fraud, and if the contract is held not binding the result is based on the fraud of A, and not on the mere inadequacy of the consideration.

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(6) Harriman, Contracts (2 ed.), Sec. 98.

§ 44. **Benefit of the promisor.** The conclusion that a benefit to the promisor is immaterial is illustrated by numerous cases. Thus, in Bainbridge v. Firmstone (7), A permitted B to take certain boilers belonging to A for the purpose of weighing them. It was held that the detriment suffered by him in giving up the possession of the boilers was sufficient consideration to support B's promise to return them, although it did not appear that B had in any way derived any actual advantage from the agreement. The act refrained from or done may be an actual benefit to the promisee, yet if it is something he had a legal right to do or not to do, giving up this right is a consideration. In Talbott v. Stemmons (8), A promised to pay B $500 if he would not use tobacco during the life of A. B abstained and was allowed to recover on the ground that as he had a right to use tobacco, refraining from doing so would constitute a consideration. In White v. Bluett (9), the defendant's father agreed not to sue on a note given by the defendant to him if defendant would cease to complain that he had not been treated as well as the other children. The court held there was no consideration since defendant had not suffered a detriment, inasmuch as he had no right to complain to his father.

§ 45. **Illusory promises.** It will be noted that the decision in the above case might properly be sustained on the ground that the defendant's promise was so indefinite that the court could not tell what the parties meant by it.

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(7) 8 Adol. & E. 743.

(8) 89 Ky. 222.

(9) 23 L. J. R. (Exchr.) N. S. 36.

Thus, in Taylor v. Brewer (10), the court refused to enforce a contract on the ground of indefiniteness where A agreed to work for B for such remuneration as B deemed right. On the other hand in Dunton v. Dunton (11), A promised his divorced wife that as long as she conducted herself with sobriety and in an orderly manner he would pay her a certain annuity. The court sustained the contract, saying that the wife had a perfect legal right to act in a disorderly manner and her agreement not to do so was a legal detriment. Probably this case should have been decided the other way, on the ground that the undertaking of the wife was too indefinite.

§ 46. **Consideration void in part.** It sometimes happens that the consideration is void in part owing to the nature of the act to be done or because the promisee already is under obligations to do the identical act. The promise will still be enforceable if any part of the consideration is valid. Thus, in Jamieson v. Renwick (12), A agreed to pay B £25 annually, provided B would not attempt to reside in S, visit or annoy A or interfere with him, or claim or attempt to claim any interest in A's land. It was held that the promise not to annoy was nugatory since plaintiff had no right to do so, but that the other considerations named in the agreement were valid and sufficient to support the contract. Again, if A promises to pay B one hundred dollars in consideration of two acts, one of which is lawful,

(10) 1 M. & S. 290.
(11) 18 Vict. L. R. 114.
(12) 17 Vict. L. R. 124.

the other of which is unlawful, if A sues B he can recover for the nonperformance of the lawful act, since if A is willing to pay the entire consideration for the lawful act, he is entitled to recover and B can not object. If, however, B attempts to sue A he cannot recover at all, since A has not promised to pay one hundred dollars except on the promise that B does the two acts contracted for and no obligation arises until these acts are done, although one is illegal. If B had performed both the legal and the illegal acts he would still be unable to recover because of the unlawful nature of his act.

§ 47. **Subscription contracts.** Considerable difficulty has been experienced by the courts in determining what constitutes the consideration in subscription agreements (13). The commonest form in which the question is presented is where a church society desiring to raise funds to pay off an indebtedness or to build a church edifice circulates a subscription paper, which is usually in the following terms:

"We, the undersigned, agree to pay the sum set opposite our respective names to the trustees of the X church, the amount to be applied in the discharge of the church debt."

Suppose A is one of the signers of the paper and refuses to pay. Can he set up that there is no consideration and therefore his promise is nothing more than an offer which may be withdrawn at any time? The majority of courts have accepted the view that the signing of a subscription of this character constitutes an offer to the

(13) Harriman, Contracts (2 ed.), Sec. 128-131.

church which ripens into a contract when the church does something in reliance upon the offer. In the ordinary case of an offer, the offer itself stipulates what acts will constitute a consideration, but in this particular form the offer simply stipulates that the funds shall be applied to the discharge of the church debt. Applying the fund to the discharge of the church debt could not be the consideration since the fund could not be applied until paid into the hands of the society. The difficulty is in determining just what act will constitute an acceptance. It does not seem sound to say that any act, whether immediately connected with the purpose for which the fund was offered or not, would be a consideration.

It is frequently held, however, that where the trustees go ahead and secure other subscriptions such an act will constitute an acceptance; also, where the subscription is for the purpose of building a church edifice and the trustees incur obligations in furtherance of that purpose, such acts constitute an acceptance of the offer. Still other courts have attempted to sustain a contract on the theory that each subscriber agrees to give the amount stipulated in consideration of the promise of every other subscriber to do the same, and the subscription paper is frequently drawn in pursuance of this idea. Thus, the following form is not uncommon: "We, the undersigned, in consideration of the promises of each other, mutually agree to pay the sum set opposite our respective names for the purpose of erecting a church at X." Two difficulties are presented in a subscription of this form: first, as the subscriptions are not all taken at the same time, it is difficult to see how the act of A in signing can be a consideration

for the promise of B, who signs at a later period; and secondly, the promises do not appear to be made to the church but to subscribers, and even if the contract were good it would seem that the church is not a party to the agreement. Owing to these difficulties, the majority of courts have generally accepted the view announced in the case of Presbyterian Church v. Cooper (14), where it was held that the subscription was an offer which would ripen into a contract on showing that the church had done some act at the request of the defendant and in reliance upon his subscription.

From the language of the courts, it would seem fair to state that the ordinary rules of contract are not applied strictly in this class of cases. In the presence of a strong moral obligation, the courts have constructed a theory of consideration that will render the subscriber liable but which they would hesitate to apply to an ordinary contract. The ordinary subscription is in reality merely a conditional gift, and on principle should not be enforceable at law.

§ 48. **Composition with creditors.** Still another group of cases presents an apparent exception to the rule that all contracts must be supported by a consideration. Thus, where a debtor makes an agreement with his creditors whereby the creditors agree to accept fifty cents on the dollar in return for the debtor's promise to pay that amount, it would seem that inasmuch as the creditors are entitled to one hundred cents on the dollar, their promise to accept one-half the amount could not operate as a con-

(14) 112 N. Y. 517.

sideration. Such compromises are, however, usually sustained by the courts, either on the theory that the consideration consists in the undertaking of a debtor to secure the consent of all other creditors to the surrender, or that the creditors mutually agree with each other for the benefit of the debtor (15). Settlements under the bankruptcy act, whereby the debtor is discharged, do not come within the rule, as his discharge is not based upon contract, but upon an express provision of the law.

§ 49. **Performing or promising to perform a contract obligation.** Doing what one is already bound to do is not a good consideration. Thus, in the leading case of Foakes v. Beer (16), A had obtained a judgment against B, and an agreement was made by which B promised to pay the judgment in installments and A agreed to accept the same. After all the installments were paid, A sued B for the interest which had accrued on the judgment and it was held that he could recover, since B by the terms of the judgment was bound to pay interest and his agreement to pay the judgment was a mere promise to do something he was already bound to do and there could be no consideration for A's agreement to release the claim.

If, however, the agreement is that the debtor shall pay at a different place or pay in a different manner, this will constitute a detriment and support a promise on the part of the other party to accept the act in satisfaction. In the case of Jaffray v. Davis (17), A gave his notes for $3462 to B, which were accepted in complete satisfaction

(15) Anson, Contracts (Huffcut's 2 ed.), 120, note.
(16) L. R. 9 App. Cas. 605.
(17) 124 N. Y. 164.

of a debt of $7714 due to B. It was held that B could not afterwards sue for the debt since A had given his note which he was not bound to do, and which, therefore, would constitute a consideration. The same rule is applied in the case of employment. Thus, in Stilk v. Myrick (18), A shipped for a voyage as a seaman. Owing to the desertion of some of the crew the vessel was shorthanded and the master promised to pay additional wages to the remaining seamen, if they would work the vessel home. It was held that this promise of additional wages was without consideration, since it was the duty of A under this original contract to assist in working the vessel home. He is, therefore doing merely what he is already bound to do. If the acts to be done by the seaman under the second agreement had been in addition to those prescribed under his original contract he could recover. In Turner v. Owen (19), the vessel proved unseaworthy, and the crew agreed to remain on the vessel in consideration of additional wages and it was held they could recover, since it was not their duty under the contract to remain with an unseaworthy vessel.

While the rule illustrated is generally accepted, yet the cases show that the courts are quick to seize upon any act that will defeat the rule. Even trivial acts will serve as a consideration provided the debtor was not already bound to perform them. In Pinnel's Case (20), one of the original cases establishing the doctrine, the court resolved that the payment of a lesser sum on the day in satisfac-

(18) 2 Camp. 317.
(19) 3 F. & F. 176.
(20) 5 Co. Rep. 117.

tion of a greater can not be a satisfaction of the whole, yet the gift of a horse, a hawk, a robe, or a peppercorn, in satisfaction is good, for it shall be intended that these articles are as valuable to the creditor as the money itself.

§ 50. **Same: Apparent exceptions to the rule.** Although the above rule is generally accepted by the courts, there are numerous decisions that apparently constitute exceptions to it. After parties have entered into a contract, and before a breach has occurred by either party, it is perfectly legal for them to abandon the agreement. The mutual giving up of their rights will constitute the consideration. As soon as the old agreement is ended the parties are at liberty to enter into a new contract, on any terms they see fit. If, however, one party refuses to carry out his promises, and the other party in order to induce him to do so, promises to pay a further sum, it would seem that under the rule no recovery could be had, since there is no consideration to support the promise.

In Lattimore v. Harsen (21), A agreed to open a cartway through B's premises for an agreed sum. A became dissatisfied, and B told A to go ahead and complete the cartway, and he would pay him for his services and materials. In an action on this latter promise, the court held A could recover, as the evidence showed the old contract was abandoned. In Vanderbilt v. Schreyer (22), A contracted to erect buildings for B. B assigned the contract to C. A refused to proceed unless C would guarantee certain bonds. C refused and A stopped work. Later C gave

(21) 14 Johns. 330.
(22) 91 N. Y. 392.

the required guaranty and the work was completed. In a suit on the guaranty, it was held C was not liable, as A had given no consideration since he was already bound to complete the building. The majority of the American and the English courts agree with the last case. A minority of the American courts reach a different result although they accept the view that a promise to do what one is already bound to do is not a consideration, holding the old contract is rescinded as a result of the new contract.

While, as already shown, such a rescission is possible it seems clear that in most of the cases, the facts will not warrant the conclusion that a rescission was intended. It is usually clear that the new promise is given to induce the performance of the original contract, and such should have been the inference in Lattimore v. Harsen (21), above.

§ 51. **Promises to third persons.** We have seen that where A has entered into a contract with B and subsequently promises to perform or performs the thing stipulated for in the original contract, in return for a promise of additional compensation by B, that this contract is not enforceable for want of consideration. Is the rule the same where the promise is made to a third person? Thus, A enters into a contract with B to build a house for B. C, who owns the land near the lot of B, where the house is to be erected, promises to pay A $100 if he will promise to carry out his contract with B. Can A recover from C this amount?

The English courts hold that he can, on the ground that by promising C he has entered into an obligation which heretofore did not exist, since he has now become bound to C to do an act which heretofore he was only bound to do for B. The English courts go even further than this and hold that where C says to A, "If you will carry out your contract with B, I will pay you $100," A can recover. In this case A has not promised C to carry out his contract with B and the consideration relied upon is the actual carrying out of the contract. Thus, in the case of Shadwell v. Shadwell (23), A was engaged to marry B and wrote to his uncle C announcing that fact. C replied, expressing his approval of the engagement, and said, "As I promised you I will pay you £500 a year until your income as a chancery solicitor reaches that sum." A married B and brought an action on the annuity promised. The court held he could recover, in spite of the objection that A had merely carried out the contract he had already made with B and that it did not appear that he had married at a different time in consequence of the promise of C.

Even where A gives his promise to carry out his contract with a third person, it would seem that is no consideration unless a promise alone is consideration. It is frequently stated that mutual promises constitute a consideration for each other. If this proposition were strictly true, then a promise to receive a gift would give rise to a contract, but this is nowhere admitted. An examination of the cases indicates that promises will only be

(23) 30 L. J. R. C. P. 145.

regarded as consideration, where, if carried out, they will result in a legal detriment. Thus, if A promises B to pay $250 when he owes him $500, in return for B's promise to release the entire claim, we have an exchange of promises, but the agreement is not binding since A's promise when completed would merely be an act which he was already bound to perform. If, on the other hand, A promised to deliver a horse to B in return for B's promise to release a claim for $500, the contract would be good, since the delivery of a horse was something not required by the original contract and giving it will be a legal detriment. Legal authors are not in accord as to the theory on which mutual promises are enforced (24).

§ 52. **Performance of a non-contract obligation.** We have already seen that the mere doing what one is already under contract to do with another cannot constitute a consideration. On the same principle, the doing or promising to do an act which a person is already bound to do by law, or the refraining from doing of something which a person has no legal right to do can not constitute a consideration, since it cannot be a legal detriment. Thus, where an offer of a reward is made for the apprehension of a criminal and an officer whose duty it is to apprehend criminals makes the arrest, he cannot claim the reward, since he has merely done what he is already bound to do, and will not be permitted to say he has performed his duty on reliance upon a particular offer (25).

If, however, the act done in reliance upon the offer is

(24) Wald's Pollock, Contracts (Williston's ed.), 208.

(25) Gillmore v. Lewis, 12 Oh. St. 281.

one which the performer was not bound to do as the result of his official duty, a good contract will arise. In Reif v. Paige (26), A, whose wife's body was supposed to be in a hotel which was on fire, said that he would give $1000 to any one who would bring out the body. B, a fireman, went into the building, and brought out the body. In an action to recover the reward, it was contended that B had merely done what he was bound to do as a fireman, but the court held that the duty of a fireman did not embrace entering a burning building at the risk of life for such a purpose, and therefore the act would furnish a consideration for the promise. Similarly in the case of Harris v. More (27), the court held that an officer who had gone outside of his jurisdiction for the purpose of collecting evidence, could recover the reward offered for such evidence, since it was not his duty to procure it.

§ 53. **Compromise or forbearance of a claim.** The law favors any conduct between disputants that will result in limiting litigation. Accordingly the courts look with great favor on the compromise or forbearance of suits. It is not necessary that a claim be actually in suit in order that its withdrawal may be the basis of a settlement, but if A makes a claim against B in good faith, which B disputes, and it is afterwards agreed that A will give up his claim in consideration of the payment of a less sum, the court will ordinarily sustain such a transaction. It is apparently immaterial that A's claim is not well founded in law. In Callisher v. Bischoffsheim (28), it

(26) 55 Wis. 496.
(27) 70 Cal. 502.
(28) L. R. 5 Q. B. 449.

appeared that A had a claim against the government of Honduras, and in consideration that he would forbear the claim for a certain time, B agreed to give certain securities. In a suit on this contract by A, B set up that no money was due A from the government of Honduras. The court held, however, that if the plaintiff had made a claim in good faith and had forborne to press it in consideration of the promise of defendant, defendant would be liable. In some jurisdictions, however, the courts have laid down a more stringent rule. Thus, in Gunning v. Royal (29), it appears that A had hired a horse of B which was driven by an incompetent, inexperienced employee of B, and as a result of the driver's negligence the horse was killed. B demanded that A pay for the horse, and A gave his note in settlement. In suit on the note, he set up the want of consideration. The court held that there was no consideration. The loss was due not to the negligence of A, but to the incompetence of B's own servant. The court stated the law as follows: "The existence of a dispute or controversy between parties is not a sufficient consideration to support a promise to pay money in settlement of it, where no valid demand for anything whatever exists in favor of the promisee."

It would seem on principle that the majority rule should be sustained, since otherwise the policy of the law to encourage compromises would be largely defeated, as the only claims that could be compromised at all would be those that were doubtful in law or in fact. The parties to such settlements are protected by the further rule that

(29) 59 Miss. 45.

if the claim which is the basis of compromise was entirely unfounded, so that no reasonable man having knowledge of the facts that were in possession of the complainant would have believed that he had a claim, that would usually be sufficient evidence to show that the claim was made in bad faith.

§ 54. **An actual claim must be presented.** A promise given for the purpose of lulling into security possible claimants will not result in a contract of compromise, unless an actual definite claim of some sort has been made against the party promising. This is illustrated by the case of Miles v. New Zealand Co. (30). At a meeting of the stockholders of the New Zealand Company, great dissatisfaction was expressed on account of representations made by A who had been the principal promoter of the company. A accordingly promised that he would guarantee certain dividends on the stock for a fixed period. The company later sought to enforce this promise, but it was held, since no actual claim had been made against A on account of his representations, the promise by A must be regarded as a mere statement upon which the company had not relied and cannot now recover.

§ 55. **Forbearance to sue.** It is not necessary in order that a promise may be enforceable that the promisee in turn promise to forbear his claim. It is enough if he actually does forbear for a reasonable time in reliance on the promise. In the case of the Alliance Bank v. Broom (31) A had a claim against B which was due and on which

(30) L. R. 32 Ch. D. 266.

(31) 2 Drew & Sm. 289.

he was pressing for payment. He demanded security and B offered certain collateral if A would not bring an action. An action was brought by A against B to recover on this promise, and it was held that although A was not bound not to sue on the original claim, yet as he actually did forbear in reliance upon B's promise to furnish the securities, he could recover. Even in a case where A promised the creditor to guarantee a certain debt if the creditor would forbear to press for immediate payment, some of the judges in the case held that this would constitute a good consideration, since the word "immediate" would be construed to mean forbearance for a reasonable time (32). What is a reasonable time is determined by the facts of each particular case. Usually the time is indicated by the terms of the contract or the circumstances surrounding the parties at the time it was made. In The Traders' National Bank v. Parker (33), A signed a note as guarantor, which B owed to C, in consideration of the forbearance of a suit against B. In an action on the guaranty, it was claimed there was no consideration. It appeared that A, who was also a creditor of B, signed the guaranty for the purpose of delaying action in order that he might inquire into certain assets of B in the hope that they would be sufficient to pay both claims, if a proper disposition of them could be made. It was accordingly held on these facts that a forbearance for a sufficient period to enable A to examine this property was contemplated.

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(32) Oldershaw & Musket v. King, 2 Hurl. & Nor. 399, 517.

(33) 130 N. Y. 415.

Actual forbearance, however, will not be sufficient to support a promise where it is clear that the parties intended that the promisee should promise to forbear. In Strong v. Sheffield (34), A promised not to sue until he needed the money, in consideration of B's promise to guarantee the debt of C to A. The court held that the promise not to sue until he needed the money was too indefinite and imposed no obligation on A, and was therefore invalid. It was claimed, however, that A had in fact forborne in reliance on the promise, but the court said this could not constitute a consideration since B had contemplated a promise in exchange for his promise, and not a mere act of forbearance.

§ 56. **Past consideration.** It has already been shown that in order that an act be a consideration for a promise or a promise for a promise, that they must be given in exchange for each other and in reliance upon each other. Therefore, if the act which is relied upon as a consideration was done before any promise was made it will not support a subsequent promise. In Roscorla v. Thomas (35), A contracted to sell a horse to B. Later B refused to take it unless A warranted that the horse was not over five years old, and also that it was not vicious. A gave his promise to this effect and B sued him for breach of it. It was held he could not recover since there was no consideration to support the promise. The purchase price which B agreed to pay could not be a consideration for this new promise, since it was given for A's promise to

(34) 144 N. Y. 392.
(35) 3 Q. B. R. 234.

sell the horse, and before the promise sued upon was made.

§ 57. **Same: Apparent exceptions to the rule.** Certain cases at first sight appear contrary to this rule. In Lampleigh v. Brathwait (36), the leading case on the subject, it appeared that A at the request of B, who had committed a crime, endeavored to obtain a pardon from the king, and made a journey to the court for that purpose. Afterwards in consideration of these acts B promised to pay £100 for which action was brought. It was held that A could recover, the court intimating that as the act was done at the request of B, although no action would have lain in the absence of a promise, yet the past acts would nevertheless support the subsequent promise. This case has been explained on a ground which makes it consistent with the modern rule, namely, that inasmuch as B requested A to perform services for him under circumstances that would indicate an intention on his part to pay for the same, an action would lie for the amount irrespective of the express promise, the office of the express promise being merely to serve as evidence that the services were actually to be performed with the intent that they should be paid for and were not merely gratuitous (37). The modern cases are in accord with this statement. In Hatch v. Purcell (38), an action was brought by A, who had been an inmate of B's household for many years and had assisted in the work of the house and the management of the household affairs. Afterwards B

(36) Hobart, 105.

(37) Kennedy v. Broun, 13 C. B. (N. S.) 677.

(38) 1 Foster (N. H.) 544.

requested A to bring in a bill for services. This request was taken by the court as evidence that A's position in the household was that of a servant and not of a mere dependent, and therefore that she might have recovered irrespective of the express promise. Where a person, as a son or daughter, continues to reside at home after reaching legal age, the presumption is that such services as may be rendered are gratuitous, and no recovery can be had in the absence of an affirmative agreement.

There are many cases where A has performed services for B at the latter's request, where B has, after the service has been completed, promised to pay a fixed sum. In such cases the promise to pay a fixed sum is received as evidence of the value of the services. If A had brought an action for the services without any agreement being made as to the amount, he would be entitled to recover the amount which the jury should find on proper evidence was the fair value of the services. Where B promises to pay A a fixed sum and A assents to the same by bringing an action for that sum, it amounts to an agreement between A and B that the fair value of the services is the sum named. This agreement is supported by a perfectly valid consideration since both A and B have given up their right to have a jury pass on the question of value, and the giving up of this right would constitute a detriment and consideration. In Wilkinson v. Oliveira (39), A loaned a letter to B to be used by the latter in aiding him to perfect a claim to an estate. It appeared that the loan was made under circumstances showing an intent

(39) 1 Bing. N. Cas. 490.

to be paid, so A might have recovered the reasonable value of the use. Afterwards B promised to pay A £1000 and he was allowed to recover on the above principle.

§ 58. **Moral consideration.** The fact that A has rendered services for B which morally would entitle him to recover will not be enough to sustain an action. If A rescues B from drowning, there is perhaps a moral obligation for B to pay a reward, particularly if A sustained loss as a result of his act, but B would not be liable although he afterwards promised to pay a fixed sum. In Mills v. Wyman (40), the adult son of A became ill while penniless and among strangers, and was nursed by B. A was not legally liable for services rendered to his adult child. A afterwards promised B to pay him the value of his services. It was held he could not recover since B had not undertaken the care of the son in reliance upon any promise of A. In such a case there is every moral reason why A should compensate B for his services, but no recovery can be had in law.

§ 59. **Same: Apparent exceptions to the rule.** Certain cases are frequently cited to sustain the proposition that a moral consideration will support a promise, but on examination it appears that they really do not sustain this rule, and are not exceptions to the general proposition. In Lee v. Muggeridge (41), B, a married woman, gave a bond to secure an advance made by A to B's son, After the death of B's husband she wrote to A promising

(40) 3 Pick. 207.
(41) 5 Taunt. 36.

that her executors would pay the bond. The court held that while the bond given by B was unenforceable, yet the promise given afterwards when she was unmarried and therefore capable of making a contract would support the obligation to pay. This case, frequently cited to sustain the proposition that a moral consideration will support a promise, has been much criticised and no longer represents the law.

Where a person under a legal obligation to pay a sum of money is discharged by act of law, as where A indebted to B goes into bankruptcy and is discharged from his obligation as a result of such proceedings, if he afterwards promises B to pay the amount, B can recover; not on the ground, however, that the moral obligation to pay the debt honestly incurred will constitute a consideration, but on the theory that the discharge in bankruptcy is merely a defense which the law has given to the debtor and which he may use or not at his pleasure. Accordingly if he agrees not to use it, it constitutes a waiver which prevents him from setting up the discharge (42).

The same rule applies in the case of debts which are barred by the statute of limitations. Thus, if B owes A a sum of money which has been due for the period of time provided by the statute of limitations, if A sues B to collect, B can set up the statute as a defense. Like the discharge in bankruptcy most courts regard the statute of limitations as a defense which may be used or not at the pleasure of the debtor. Accordingly, if he acknowledges the debt, it will operate as a waiver of such a defense (43).

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(42) Dusenbury v. Hoyt, 53 N. Y. 521.

In many jurisdictions by virtue of statutes, a waiver of the statute can only be made in writing signed by the debtor.

§ 60. **Action on the original contract.** The action to recover in this class of cases is on the old contract, the new promise being received merely for the purpose of showing that the defense which would otherwise be available to the defendant has been waived. This is indicated clearly in the case of Ilsley v. Jewett (43), above, where the action was on a bond given by A that B, a debtor committed to prison for debt, would not exceed the prison limits of a certain town. After the debt had been barred by the statute of limitations, a new promise was given by B to pay the debt, which operated as a waiver of the statute. In the meanwhile, the prison limits of the town had been changed so that if the action was on the new promise, there could be no recovery since the defendant had not exceeded the new limits, but the court held the bond was forfeited since the action was in reality on the old contract and the prison limits in force at that time would control.

§ 61. **Original obligation void.** If by reason of the legal incapacity of a party, as in the case of married women at common law, a contract is absolutely void, a subsequent promise to pay after the disability has been removed will not give rise to an obligation, since the subsequent promise can only be regarded as a waiver of a defense to a contract which otherwise was perfectly valid. In some jurisdictions, however, the rule as to contracts of

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(43) Kent v. Rand, 64 N. H. 45; Ilsley v. Jewett, 3 Met. 439.

married women has been modified, so that such contracts may be regarded as merely unenforceable while the marriage subsists, but otherwise valid. The same rule would be applied as in the case of the waiver of the statute of limitations, or of defense in bankruptcy (44).

(44) Goulding v. Davidson, 26 N. Y. 604.

CHAPTER IV.

CONTRACTS UNDER SEAL. PARTIES.

§ 62. Definition. A contract under seal or specialty is an undertaking in writing formally solemnized by the seal of the party (1). It was the common form for important undertakings in the earlier period of the law, but the growing tendency to disregard forms, coupled with legislation, has modified the law of sealed instruments profoundly, and assimilated them in many respects to ordinary simple contracts. Various obligations are specialties at common law; thus covenants, deeds, bonds, are forms of specialties, since they required a seal to give them validity. The term deed, synonymous with specialty, is now confined in ordinary meaning to sealed and unsealed conveyances of real estate.

§ 63. Seal. Form and signature. A valid seal at common law is an impression upon wax, or a wafer, or some tenacious substance capable of being impressed (2). The later decisions have greatly modified this requirement; thus it has been held that a scroll made with a pen with the word seal or L. S. is sufficient, or an impression upon the instrument made with a die sufficiently clear to be recognized is a valid seal (3).

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(1) Bishop, Contracts, Sec. 110.

(2) 3 Coke's Inst. 169.

(3) Jacksonville, etc., Railway Co. v. Hooper, 160 U. S. 514; Pillow v. Roberts, 13 How. 472.

No particular form of words is essential nor is it necessary that the instrument be signed by the parties to it, since their seals and not their signatures determine the validity of the instrument (4). The names of the parties must appear in the instrument.

§ 64. **Delivery. Escrow.** Merely sealing does not give the instrument binding force. It must be delivered to the party, for whose benefit it is made.

Delivery to one not a party to the instrument, to be delivered by him to the party entitled on the happening of a stipulated event, is termed delivery in escrow, and the specialty does not become effective until the happening of the condition and the delivery to the party entitled (5). If the specialty is delivered to the party *entitled,* although upon condition, the condition is void, and the specialty is in full force. If, however, the transaction is not one requiring a seal, a conditional delivery to the one entitled is valid, as the transaction stands on the footing of a simple contract (6).

The specialty must be completely filled out before sealing and delivery, and subsequent additions invalidate the instrument, unless there be a subsequent re-execution or a new delivery (7).

§ 65. **Consideration.** An instrument under seal does not require a consideration. The statement frequently made that the seal imports or implies a consideration is

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(4) Parks v. Hazlerigg, 7 Black. 536.

(5) Gilbert v. North American Ins. Co., 23 Wend. 43.

(6) Ordinary v. Thatcher, 41 N. J. L. 403; Blewitt v. Boorum, 142 N. Y. 357.

(7) Powell v. Duff, 3 Camp. 181; Hudson v. Revett, 5 Bing. 368.

incorrect, since sealed instruments were recognized at law long before the doctrine of consideration was developed (8).

In states where seals are not abolished statutory provisions are often found which provide in substance that "a seal upon an executory instrument shall be received only as presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument were not sealed." Such a provision in effect destroys the character of a specialty, since the seal is merely presumptive evidence of a consideration, the absence of which may be shown to defeat the obligation. In states where such a statute is in force, the courts have sustained voluntary deeds. Thus where A executed a promise under seal to pay a sum of money to B, his son, the court sustained the instrument on the ground that the law was not intended to abolish the distinction between specialties and simple contracts, but was designed to make the rule applied by equity courts effective in a law court. They would disregard the seal and require a consideration when it was evident the parties intended a consideration; if it was clear that no consideration was intended a sealed obligation would be enforced (9).

§ 66. **Other modifications of the old rules.** Various other modifications of the old law respecting specialties have been made. Thus the ancient doctrine that a specialty could be destroyed or modified only by an instrument of like dignity, i. e., an instrument under seal, no

(8) Candor & Henderson's Appeal, 27 Pa. St. 119.

(9) Aller v. Aller, 40 N. J. L. 446.

longer prevails, and a specialty can be rescinded orally or modified by a subsequent oral or written agreement (10).

§ 67. **Disabilities limiting contractual capacity.** Two classes of natural persons are limited in their capacity to make contracts: 1. Those lacking mental capacity, as lunatics. 2. Those possessing mental capacity but lacking legal capacity, as infants or minors and married women. The second class formerly embraced a number of persons no longer included, such as aliens, convicts, and so forth. The abolition of slavery narrowed this class still further. Legislation has greatly modified the doctrines of the law as applied to married women. A third class of limited contractual capacity consists of artificial persons created by law, such as corporations.

§ 68. **Insane persons and idiots: English rule.** Insane persons and idiots are said to be liable on their contracts for necessaries. Their liability is not on the express promise, but on an implied one for the fair value of the goods furnished or services rendered. In this respect the liability is the same as that of infants. The English courts have gone much further than the American courts in holding an insane person liable on his contracts. In Imperial Loan Co. v. Stone (11), A signed a note as surety. The jury found that at the time he signed he was insane and incapable of understanding what he was doing. It did not appear that the plaintiff knew of A's insanity at the time when A signed the note. It was held that the

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(10) Bishop, Contracts, Sec. 130.

(11) (1892) 1 Q. B. 599.

plaintiff could recover against A, the court saying: "When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding on him in every respect, whether it is executed or executory, as if he had been sane, when he made it; unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."

§ 69. **Same: American rule.** In the United States the courts are not in accord. Some decisions apparently follow the English rule. The majority of courts take the view that when the person contracting with the insane person was not aware of the insanity, and the insane person has not been adjudged insane by a competent tribunal, the contract will be carried out if it has been so far executed that it is not possible to put the parties in their original position. In Gribben v. Maxwell (12), A, an insane person, conveyed land to B, for a consideration paid. Afterwards A was adjudged insane, and C being apointed as guardian, brought an action to recover the land. It was held he could not recover, since the contract was executed, and C did not tender back the price paid. In this case it was apparently possible to put the parties back as they were before the contract, but C did not offer to return the purchase price and so was refused relief.

§ 70. **Where insanity is known.** In Crawford v. Sco-

(12) 34 Kan. 8.

vell (13) A conveyed property to B while insane. After recovering his reason he brought the action to recover the property, showing that B knew of his insanity at the time of the sale and took advantage of it. It was held that B's conduct was a fraud on A and the relief asked for was granted. A was not compelled to tender the price received.

§ 71. **When the contract is void.** Some courts hold a deed by an insane person to be void, but the majority of the courts place deeds on the same footing as other contracts and voidable merely (14). Where, however, a person has been adjudged insane and a conservator (trustee or guardian) has been appointed to manage his affairs, contracts made by the insane person are held to be absolutely void. A provision to this effect is usually made by statute. If no guardian is appointed, or the guardian resigns, the insane person's contracts are merely voidable (15).

§ 72. **Monomania and lucid intervals.** Where the insanity takes the form of monomania, the insanity consisting of delusions on particular subjects, contracts where the subject matter is not affected by the monomania are binding. In Boyce's Admrs. v. Smith (16) A gave his bond to B in settlement of certain business obligations. Before and at the time of the transaction A was suffering from religious monomania, but in other respects was nor-

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(13) 94 Pa. St. 48.

(14) Wilkinson v. Wilkinson, 129 Ala. 279; Luhrs v. Hancock, 181 U. S. 567.

(15) Mohr v. Tulip, 40 Wis. 66.

(16) 9 Gratt. 704.

mal and attended to business. It was held that A's estate was liable, the monomania being in no way connected with the subject matter of the bond, which was therefore valid.

A person suffering from insanity may have lucid intervals, and contracts made by him during such intervals will be binding. The burden of showing that the promisor was sane at the time would be upon the person seeking to enforce the contract. Since the contracts of an insane person are voidable merely, he may in like manner as an infant confirm them, when restored to reason (17).

The defense of insanity can be raised only by the insane person or his duly appointed guardian or personal representatives.

§ 73. **Drunkards.** Persons so far under the influence of liquor as to be unable to realize their acts are in the same condition temporarily as insane persons, and the same general rules apply. They are liable for necessaries furnished in any event, and other contracts are treated as voidable at their election. In Barrett v. Buxton (18), A and B entered into a contract for the exchange of certain real estate, and a note was given by B for the difference in value between the properties to be exchanged. In a suit on this note by A, B alleged that he was drunk at the time the note was signed. It was held that B could set up his intoxication as a defence, if it was sufficient to deprive him of his understanding, even though the intoxication was voluntary and not procured through an

(17) Allis v. Billings, 6 Met. 415.
(18) 2 Aik. (Vt.) 167.

act of A. The fact that he is excited by liquor is not enough, however, provided he is sufficiently sober to understand the business involved (19). The same is true in the case of a person of feeble intellect. If he has sufficient understanding to appreciate what is being done the transaction will stand. Questions of this character are usually complicated by evidence of fraud and undue influence.

§ 74. **Infants.** All persons under 21 years old are infants or minors at common law. Statutes frequently fix the age at 18 in the case of women. In general an infant's contracts are not enforceable against him, except for necessaries. He may affirm or avoid them when he comes of age. The subject of infant's contracts is fully treated in Part IV of the article on Domestic Relations and Persons, in Volume II of this work.

§ 75. **Married women.** All contracts of married women were void at common law, the marriage relation depriving her of this power. In equity she had certain powers to charge her separate property by contracts. Modern legislation has everywhere greatly enlarged her capacity to contract. The subject is fully discussed in Part II of the article on Domestic Relations and Persons, in Volume II of this work.

§ 76. **Corporations.** Contracts may not only be made by natural persons of legal and natural capacity, but by artificial persons created by law, and treated as having a distinct personality. The most conspicuous example of such an artificial person is the corporation. A corpor-

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(19) Schouler, Domestic Relations, Sec. 5.

ation is really an aggregation of individuals who are treated in law as one person for the ordinary purposes of doing business. The power to make contracts in furtherance of purposes for which the corporation is organized is inherent, and need not be expressly granted. Contracts for a purpose beyond the powers expressly or impliedly granted to the corporation are said to be ultra vires or beyond the powers granted. Considerable difference of opinion exists as to how far ultra vires contracts may be enforced where they have been partly executed. The subject is fully discussed in the article on Corporations in Volume VIII of this work.

CHAPTER V.

STATUTE OF FRAUDS.

§ 77. **Policy of the statute.** The law requires that certain classes of contracts shall be proven by a certain kind of evidence, in order to be enforceable in a court of law.

The purpose of such a rule is not to create a class of formal contracts, but to protect persons engaged in business transactions against perjury and false swearing. This rule of law had its origin in the statute, 29 Charles II (1677), chap. 3, sec. 4 and sec. 17, known as the statute of frauds. Most of this statute has been enacted with slight modifications in every American jurisdiction. It does not prescribe a form for legal agreements, but merely the kind of evidence that the court will receive to prove such agreements. If the agreement has been fully carried out, no question of its validity can be raised (1). It is only when the alleged agreement comes before the court for enforcement that the statute becomes important. A contract may be perfectly good and yet not enforceable, because the proper kind of evidence is lacking (2). Whenever this evidence is obtained relief can be had on the contract. Thus if A makes an oral contract with B that is within the statute, he can not sue B on it unless he can prove it by a memorandum, signed by B,

(1) Stone v. Dennison, 13 Pick. 1.

(2) Wald's Pollock Contracts (Williston's ed.), 748.

showing the terms of the contract; but if he secures a memorandum or letter made at a later time in which B acknowledges the obligation, A can recover, since he now has the sort of evidence required.

§ 78. **Provisions of the statute.** The parts of the statute generally adopted in the United States are as follows: "Sec. IV. No action shall be brought, (1) whereby to charge any executor or administrator upon any special promise to answer for damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made in consideration of marriage; (4) or upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

"Sec. XVII. Be it further enacted . . . . that no contract for the sale of any goods, wares and merchandises for the price of £10 sterling or upwards [amount varies in American statutes] shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged

by such contract or their agents thereunto lawfully authorized."

In several states, as Illinois, this section is not in force.

§ 79. **Special promise by executor or administrator to pay out of his own estate.** An executor or administrator is not personally liable upon claims against the estate. His duty is to administer the funds that come to him as executor, and to pay debts and legacies as far as possible out of the assets. If he promises to pay a claim against the estate, it will not bind him personally, unless he clearly indicates that his promise is personal. Even then it is not binding unless the promisee has given a consideration, and the agreement is evidenced by a writing signed by him or his agent, as required by the statute of frauds. The promise must be to pay a claim made against the estate. In Bellows v. Sowles (3), the executor of B's estate promised to pay C, an heir of B, a sum of money if he would not contest the will. This promise was not to pay a claim against the estate, or in settlement of one, but merely to protect the private interests of A. Hence the statute does not apply.

§ 80. **Promise to answer for the debt, default, or miscarriage of another.** The only class of cases that comes within this clause of the statute are those where there is a promise to pay a subsisting obligation between the promisee and a third person, if the third person fails to pay. Thus A is requested to sell goods to B. C says to A, "Sell goods to B and if he does not pay for them, I will." This is a typical case coming within the statute.

(3) 57 Vt. 164.

This provision of the statute is discussed in the article on Suretyship, Chapter I, in Volume VII of this work.

§ 81. **Agreements in consideration of marriage.** This clause does not apply to mutual promises to marry but to promises to make a settlement of property or to pay money in consideration of marriage. Thus a promise by a man to settle certain property upon or pay a sum of money to a woman in return for her promise to marry or for actual marriage is within the statute.

§ 82. **Contracts for the sale of land, tenements, etc.** "This clause applies to all contracts affecting in any way the title to any kind of interest in any kind of real property, except leases, which are governed by other sections of the statute" (4). Contracts which are preliminary to the acquisition of an interest or such as deal with a remote interest are not within the statute, such as agreements to pay for the investigation of a title to land or to sell land to a purchaser that a land agent shall find (5). Partnership agreements to deal in lands are not within the statute. Otherwise, where the parties agree to transfer specific lands to the firm (6). Growing annual crops, called emblements or fructus industriales, are treated for most purposes as chattel interests or personalty. The rule is otherwise in the case of natural products, called fructus naturales, such as timber, grass, etc. Thus, a contract by A to sell the standing trees on his land, is a sale of an interest in land. If, however, the title to the

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(4) Harriman, Contracts (2 ed.), Sec. 584.

(5) Heyn v. Philips, 37 Cal. 529.

(6) Goldstein v. Nathan, 158 Ill. 641.

trees is not to pass to the purchaser until after they are severed from the land, as where A is to cut the trees and B is to take them as felled, the contract is for the sale of personal property. See Sales, § 18, in Volume III of this work.

Courts of equity have permitted certain acts in connection with oral contracts for land to take the place of a writing. Taking possession of land and paying for it, for instance, will enable one to obtain a deed for it under an oral contract. This is fully discussed in the article on Equity, §§ 39-42, in Volume VI of this work.

§ 83. **Agreements not to be performed within the space of a year.** This clause has been so construed that contracts that by any possibility can be performed within a year are not within its terms. Thus in Warner v. Texas & Pacific Railway Co. (7) the company orally agreed to put in a switch opposite A's mill provided that he would furnish the ties and grade the ground, the company to put down the rails and maintain the switch as long as A needed it. It was held that the contract was not within the statute, since the contract might have been performed within a year. It is immaterial that the time of performance is uncertain and may be extended and, as a matter of fact, is extended beyond a year. If on the other hand the agreement had been that the switch would be maintained for a period beyond one year, the statute would apply.

§ 84. **Same: Performance contingent on an uncertain event.** If the performance of the contract is contingent

(7) 164 U. S. 418.

on an event that may occur within a year, the statute does not apply. Thus in Peters v. Westborough (8), A orally contracted to support B until she was eighteen years of age. It was held that, since this contract would be terminated by the death of B, which might occur within a year, the contract was enforceable. When the promises on one side can be performed within a year, but the other side can not, the cases are in conflict. Thus in Marcy v. Marcy (9), A, in consideration of a farm then conveyed to him, promised to pay B $500 when B reached the age of twenty-one. The contract was held to be within the statute, since A's promise could not be performed within a year. A different result was reached on similar facts in Piper v. Fosher (10) on the ground that since performance was complete on one side, it would be a fraud on the party who has performed to allow the statute to be pleaded. On the strict language of the statute, the view in Marcy v. Marcy seems the correct one.

A distinction must be drawn between contracts that may be performed within a year, and contracts for a longer period, which can not be so performed but in which performance may be excused by reason of the impossibility of performance. Thus in Peters v. Westborough (8), where the contract was to support B until she reached a certain age, the contract might be performed within a year if B died, since the contract is to support B for the period named if she lived so long. If, on the other hand, A had orally agreed to hire B for three years, and

(8) 19 Pick. 364.
(9) 9 Allen 8.
(10) 121 Ind. 407.

B had agreed to serve, the death of A or B which might occur within a year would terminate all liability under the contract, by reason of the impossibility of performance, but the contract would not be performed—simply its non-performance excused. Thus the second case would be within the statute, while the first case would not (11).

§ 85. **Contracts for the sale of goods, wares, and merchandise.** This provision, taken from the seventeenth section of the statute of frauds is fully treated in Chapter II of the article on Sales in Volume III of this work. Goods, wares, and merchandise include all tangible personal property. Such intangible interests as shares of stock are not within the statute under the English decisions. The American courts generally hold sales of shares of stock are within the statute, since stock is a common subject matter of sale.

§ 86. **The memorandum.** Where the contract is within the statute , it must be evidenced by a note or memorandum signed by the party to be charged therewith or his duly authorized agent. The term used, note or memorandum, indicates that a formal written agreement is not essential. The purpose of the statute is to protect the promisor against false claims and therefore any writing which discloses the terms of the agreement, the parties thereto, and signed by the person against whom the suit is brought is sufficient. What constitutes a sufficient memorandum is discussed in the above mentioned article on Sales, §§ 25-28.

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(11) Shute v. Dorr, 5 Wend. 204.

PART II.

OPERATION OF CONTRACTS.

CHAPTER VI.

JOINT AND SEVERAL CONTRACTS. ALTERNATIVE CONTRACTS.

§ 87. **Joint or several liability.** Any number of persons may be parties to an agreement. Where more than two are parties, their rights under it either as promisors or promisees will be determined by the construction of the instrument. The parties may intend a joint liability or right, or a several liability. Usually the language of the instrument will disclose the kind of obligation intended. Thus a note beginning "We promise to pay," signed by A, B & C would be a joint obligation. If it begins, "I promise to pay" and is signed as before, it would be joint and several (1). Where the language of the obligation is not clear, the court will consider the nature of the agreement, and who received the consideration; if all received it, the contract is joint. Where two or more are parties to a promise, the presumption is that it is joint, although this presumption may be rebutted. The rule of construction has been modified by statute in many states, so that the presumption is the other way, i. e., that an obligation is joint and several, unless affirma-

(1) Barnett v. Juday, 38 Ind. 86; Hemmenway v. Stone, 7 Mass. 58.

tively shown to be joint. In many states, the statutes declare joint obligations to be joint and several.

§ 88. **Joint contracts.** In a joint contract the obligation is entire. Thus where A, B & C are jointly liable to X, there is but one cause of action against A, B & C. They are really conceived of as forming a distinct group or entity apart from the individual members of the group.

If X releases A, the result is that B & C are also released, since there is but one obligation (2). X can release A from the obligation in another way, however. He may promise A for a consideration not to sue him. This will not destroy the obligation, and X can sue all the parties, but, when his judgment is obtained, he must refrain from satisfying it by seizing A's goods. The courts are disposed to treat releases, if possible, as promises not to sue, thus saving the creditors' rights against the other parties (3). By statute in many states, a release of one will not release the others.

§ 89. **Survivorship.** Another incident of joint obligations and rights is survivorship. Thus if A and B are jointly liable to X, and A dies, X's only right at law is against the survivor B. If B then dies, X's right would be against B's executor (4). The doctrine of survivorship has generally been modified by statute, so that the estates of deceased joint obligors are bound.

§ 90. **Joint and several obligations.** Where the obligation is joint and several, the creditor must sue all the debtors in one action, or pursue each in a separate action.

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(2) Osborn v. Martha's Vineyard Ry. Co., 140 Mass. 549.

(3) Owen v. Homan, 4 H. L. Cas. 997, 1037.

(4) Richards v. Heather, 1 Barn. & Ald. 29.

Thus A has a claim against X, Y, and Z. He may join them in one action, or sue any or all of them separately, but he can not sue X in a separate action, and Y and Z in a joint action (5). This rule has also been modified in a number of states by statute.

The courts are not in accord as to whether a creditor who has obtained a joint judgment against all can afterwards sue each separately. The courts that deny such a right do so on the ground that the creditor has elected to proceed jointly, and therefore can not now sue severally (6). On the other hand, it is said that as long as the creditor has not been paid he can proceed against each debtor severally (7). The latter view treats the creditor as having a joint claim against all, and an individual claim against each debtor.

With respect to joint and several obligations, the law of survivorship does not apply, and the estate of the deceased debtor will be liable. The relief against the estate must be had in a separate proceeding, as by filing a claim against the estate; the executor of the deceased can not be joined as a party to a suit with the surviving obligors (8) since the two claims are not of the same nature.

Where the *creditors* are joint, the same rules apply as in the case of joint debtors, but obligations of this character can not be joint and several, although they may be joint or several. Thus A & B jointly entitled to a claim against C must both join in the action. If the agreement

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(5) State of Maine v. Chandler, 79 Me. 172.

(6) United States v. Price, 9 How. 83.

(7) Moore v. Rogers, 19 Ill. 347.

(8) May v. Hanson, 6 Cal. 643.

is expressed to be joint or several, A and B can sue together, or A or B can sue C separately, but they cannot sue jointly and separately also, as is the case where the obligors are jointly and severally liable (9).

§ 91. Contracts performable in the alternative. Where an agreement is in such a form that the promisor can satisfy his promise by doing either one of two acts, the contract is said to be in the alternative. Ordinarily the one who has promised to do the acts has a right to decide or elect which act he will do. Thus, in Plowman et al. v. Riddle (10), A gave his note to B for $500; the note provided that it might be paid in good leather of a certain description, and at stipulated prices. It was held that A had a right to elect which he would do, at or before the note was due, and his failure to make such an election gave B the right to sue for the money.

The rule that the one who is to perform the acts has the right to elect is not applied where the circumstances indicate that a different rule was intended. In Norton v. Webb (11) A conveyed a farm to B, upon a promise by B to support A and his wife during their lives in their house on the lot if they so chose. In an action to recover the land because of B's failure to support, it was urged by B that he was only bound to support A on the farm, but the court held that since the agreement was for the comfort of A and wife, they would be allowed to elect where they would receive the support, provided the place selected did not involve B in unreasonable expense. In Thorn v. City

(9) Eudith v. Vallentine, 63 Me. 97.
(10) 7 Ala. 775.
(11) 36 Me. 270.

Rice Mills (12), A was the holder of bonds in the R. Co., interest on which was payable at the X bank or the offices of the company. It was held that it was the duty of A to notify the R. Co. at which place he would receive the interest, and until he did so, the R. Co. could not be in default, since they could not be in both places on the day the interest fell due.

Where the alternative acts are to be done at different times, a failure to do the act first in order of time will be an election to do the second. In Price v. Nixon (13), the question was whether A was in default on a debt. A had purchased goods of B on credit, B stating the credit would be six or nine months. After the six months had elapsed and A did not pay, this action was commenced. It was held that A was not liable since his failure to pay in six months was an election to adopt the alternative of nine months, and consequently the credit had not expired at the time the action was begun.

Where one of the alternative performances becomes impossible, the promisor is nevertheless bound to perform the other act. In Drake v. White (14) A was indebted to B by note; as security he delivered an iron safe to B, receiving the following memorandum of agreement: "Received of A one safe which we promise to redeliver to A or its value in money on the payment of a note signed by A." The safe was destroyed by fire without the fault of B. Held, he was liable for its value under the alternative

(12) 40 Chan. D. 357.
(13) 5 Taunt. 338.
(14) 117 Mass. 10.

promise. The result would have been otherwise if the safe had merely been delivered to B as security for the note, since he would only then have been bound to exercise ordinary care in its custody.

CHAPTER VII.

RIGHTS AND LIABILITIES OF THIRD PERSONS.

Section 1. Right of a Beneficiary under a Contract to Which He Is Not a Party.

§ 92. **General doctrine. Lawrence v. Fox.** At common law a person who was not a party to an agreement could have no rights under it, even though the agreement was made for the benefit of that person. The reason given was that the promisor had made no promise to the third party and the third party had given no consideration to the promisor for the promise. To subject the promisor to such a liability would result in making him liable in two actions when in fact he had agreed to be liable in one only (1). An apparent exception to this rule was made in cases where there was privity of blood, so called, between the parties, that is, where the relationship between the promisee and the one to be benefited was so close that in contemplation of law the third party was a party to the agreement. Thus, if A made a contract with B in which B promised to pay a certain sum to X, the son of A, X was permitted to enforce the agreement on the above theory (2). The later English cases deny even this exception (3), and permit only marriage settlement con-

(1) Price v. Easton, 4 Barn. & Adol. 433.

(2) Dutton v. Poole, 2 Lev. 211.

(3) Tweddle v. Atkinson, 1 B. & S. 393.

tracts to be enforced by beneficiaries who are not parties to the contract. The American courts have generally departed from the common law rule, and permit the third party to sue on the agreement whenever it appears that the contract was made for his benefit. In Lawrence v. Fox (4), A loaned a sum of money to B in consideration of which B agreed to pay the same amount on a future day to C, a creditor of A. C was allowed to recover on the contract on the theory that the contract was made for his benefit. In this case there was no blood relationship between the parties. The court announced as a general principle that a person for whose benefit a contract is made can sue upon it and that the case of Dutton v. Poole (2) was merely an illustration of the general rule. This decision has been followed in the majority of states with some modification.

§ 93. **Must benefit to third person be intended?** The difficult point to determine in each instance is when the contract is intended for the benefit of a third person. The question arises in two forms. A makes a contract with B by which B promises to pay a certain sum or to do a certain act for C; or A may be indebted to B and make a contract with C by which the latter promises to pay A's debt to B. In the first case the object of A is to confer a benefit on C, and in the second case his object is to discharge a debt which he owed to B. Strictly speaking the first case would be an illustration of a contract for the benefit of a third person, since the sole object of the agreement was to benefit C; whereas in the second case it is

(4) 20 N. Y. 268.

apparent that the primary object of A was to discharge his debt to B, though the result of the agreement was to confer a benefit on B. The courts, however, have failed to observe this distinction, and have permitted the beneficiary to recover whether the purpose of the agreement was solely to confer a benefit or whether its primary object was to discharge an obligation. The most common example of the latter type of cases is where A mortgages his property to B. He afterwards sells the mortgaged premises to C who, as part of the purchase price, agrees to assume the mortgage. B is generally permitted to sue on this undertaking (5).

§ 94. **Mere incidental benefit insufficient.** It must be clear that the object of the parties was to benefit the third person directly. A mere incidental benefit will not entitle him to recover. Thus in Davis v. Clinton Water Works (6), the water works company entered into a contract with the city of Clinton, by the terms of which they agreed to supply water to the city for public purposes including the extinguishment of fires, for certain compensation to be paid by the city. A was a resident of Clinton and his house was destroyed by fire, the loss being occasioned by the failure of the water works company to supply the water as agreed in the contract. It was held that he could not recover since the contract was obviously not made for his benefit. The city was under no duty to supply water and the contract on the terms indicated could not be regarded as for the benefit of any citizen. A

(5) Bay v. Williams, 112 Ill. 91.

(6) 54 Ia. 59.

different result might be reached, however, if it appeared that the city was under duty to perform the act in question and had taken a bond to secure the performance.

§ 95. **Limitations upon Lawrence v. Fox in New York.** The New York courts have in later decisions considerably modified the scope of the rule laid down in Lawrence v. Fox (4), above. The limitations put upon the doctrine are largely arbitrary. Thus, in the case of Vrooman v. Turner (7), the court held, where A sold mortgaged property to B receiving as part of the consideration a covenant by B to pay the mortgage debt, that the mortgagee could not recover, since it did not appear that A was under any obligation to pay the debt himself, and unless there was some privity between the one to whom the promise was made and the person to be benefited, no recovery could be had. In Durnherr v. Rau (8), it was held that a promise by A to B to protect the dower right of B's wife in certain property was not enforceable by the wife, since B was under no legal obligation to protect the wife's dower. The apparent result of the New York cases is to hold agreements unenforceable by third persons, unless the promisee was under a duty to provide for the third person and the particular contract is in furtherance of that duty. The limitations above indicated are largely confined to the New York courts and the great majority of the courts that allow a third party to sue on a contract refuse to recognize them (9).

§ 96. **Rescission by the parties to the contract.** After

(7) 69 N. Y. 280.

(8) 135 N. Y. 219.

(9) Tweeddale v. Tweeddale, 116 Wis. 517.

the contract is once made, the question arises whether or not the original parties to it may by agreement rescind the same without the consent of the third person. In some jurisdictions this is permitted, provided the third person has not changed his position in reliance upon the contract (10). The majority of courts, however, hold that after the right of the third party once arises it can not be destroyed without his consent, and it would seem to be immaterial whether he had changed his position or not (11).

§ 97. **Defences to suit by third party.** When a third party sues upon the contract, any defence which the promisor might have used against the promisee at the time the contract arose may be used against the beneficiary. Thus where A obtains a promise from B to pay a sum of money to C, if B's promise was induced by the fraud of A, that fact can be set up as a defense by B when action is brought against him by C (12).

§ 98. **Election of remedies.** The question is also presented whether or not the beneficiary who is a creditor of the promisee is bound to elect whether he will sue on the original debt or sue the promisor in the second contract. Thus, for example, if A is indebted to B and makes a contract with C to pay the debt, is B bound to elect whether he will sue A on the original debt or C under the new contract? The better view, sanctioned by the majority of courts, holds that he is not. The two remedies are not inconsistent and so long as B has not recovered the full

(10) Wheat v. Rice, 97 N. Y. 296.

(11) Bay v. Williams, 112 Ill. 91.

(12) Wald's Pollock, Contracts (Williston's ed.), 271.

amount of his debt in one suit, he ought to be allowed to sue the other party on the promise (13).

§ 99. **Real party in interest.** In many jurisdictions, the statutes provide that all actions shall be brought in the name of the real party in interest. It has been held that these statutes confer upon the beneficiary to a contract the right to sue. This view, however, is not generally adopted, the courts holding that the statute is not intended to determine rights between parties, but merely to indicate what parties must bring the action when the rights are once determined. Accordingly, if A has promised B to pay C, C can not recover merely by reason of this statute, but by reason of the fact that there is a contract made for his express benefit.

§ 100. **Proper basis of the rule.** The rule permitting the third party to sue upon the contract is obviously an exception to the ordinary legal rule, and is based upon the theory that inasmuch as the debtor has entered into a contract which, if realized upon, will result in assets which would be available for the payment of his debts, the creditor will be permitted to proceed directly on this obligation in an action at law. Thus, if A is indebted to B, and makes a contract with C to pay the debt, it is obvious that the claim against C is a property right which is like any other asset of A. Therefore if A is insolvent, this claim ought to be realized upon for the benefit of B, but as long as A has sufficient property to pay B, without resorting to this claim, there is no occasion to give B this right (14). Yet this limitation is not observed by the

(13) Barnes v. Hekla Fire Insurance Co., 56 Minn. 38.

(14) Wald's Pollock, Contracts (Williston's ed.), 242.

courts in the United States except those that deny the third person's right to sue at law.

Section 2. Assignment of Contracts.

§ 101. General doctrine. Under the earlier law, a contract was regarded as creating a personal relationship, and therefore one party to it could not assign or transfer his rights to a third person without the consent of the other parties to the contract. It was also urged as an additional reason for not permitting assignments that it would tend to stir up litigation, which was against the policy of the law. The equity courts recognized that in certain classes of contracts a person could transfer his right to the benefits under the contract to a third person. The modern rule substantially adopts the equity doctrine and recognizes that the benefits under certain classes of contracts may be assigned, and such transfers are ordinarily known as equitable assignments, because they first originated as a doctrine of the equity courts; but the term equitable assignment has no particular significance today, since the courts of law will enforce them as readily as the courts of equity.

§ 102. Suit in name of assignor. The method of enforcing his rights by the assignee varies in different jurisdictions. Unless modified by statute, the assignee must sue in the name of his assignor (1). By assigning his rights under the contract, the assignor is held to have conferred upon the assignee a power of attorney to sue in the assignor's name. In some jurisdictions, however, this rule

(1) Glenn v. Marbury, 145 U. S. 499.

has been modified by statute so that the assignee may sue in his own name (2). Without regard to the form in which the action must be brought, the substantial right obtained by the assignee as a result of the assignment is a power of attorney, which enables him to take advantage of such rights and such only as the assignor enjoyed under the contract.

§ 103. **What claims are assignable.** All courts agree that mere money demands may be assigned without question. Thus where A is indebted to B for a sum of money, B may assign the claim to C, who can recover it either in the name of B or in his own name, depending on the particular rule of procedure enforced. Where the claim sought to be assigned involves further duties on the part of the assignor, as for example where A has agreed to sell goods to B and B has agreed to pay a certain sum therefor at a future day, if B assigns his claim to C, the question arises whether he can transfer to C, without the consent of A, the liability as well as the benefits of the contract. It is generally held that he can not do so (3). The assignor still remains liable to carry out promises on his part, though if the services are of such a nature that they can be performed as well by third persons as by the original party, then the original party may transfer through the assignment the duty of performing the service; but he still remains responsible for any damages occasioned by the failure of the assignee to perform (4). If the con-

(2) Devlin v. New York, 63 N. Y. 8.

(3) Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379.

(4) British Wagon Co. v. Lea & Co., L. R. 5 Q. B. D. 149.

tract involves personal skill—thus if A agrees to pay B a sum of money in return for which B agrees to paint A's carriage—B could not assign this contract, since it is presumed A dealt with B on account of his skill as a painter, and the services of any other painter, however skilful he might be, could not take B's place (5). Again if A contracted to sell goods to B, and B was to pay therefor 60 days after the delivery of the goods, B could not assign this claim against the objections of A, since the agreement to give credit is based upon personal credit of B, and A can not be compelled to deliver goods on the credit of a third person (3). If, however, the sale was to be for cash, B may assign his claim since no element of credit is involved (6). It would seem, however, inasmuch as the assignor remains liable on the contract, that an assignment should be good, if personal skill is not involved, even if the sale is on credit, since the seller still may look to the assignor. It is difficult to sustain Arkansas Valley Smelting Co. v. Belden Mining Co. (3) for that reason (7).

§ 104. **Same: Personal service.** Contracts for personal services, whether involving personal skill or not, are non-assignable. Contracts of this character do not survive the death of either party and for that reason are regarded as non-assignable. Thus in Lacy v. Getman (8) A was employed to work as a farm hand for B for one year. B died within the year. Since the farm passed to

(5) Robson v. Drummond, 2 Barn. & Ad. 303.
(6) Rochester Lantern Co. v. Stiles Press Co., 135 N. Y. 209.
(7) Tolhurst v. Ass'n of Mfgrs. L. R. (1902) 2 K. B. 660.
(8) 119 N. Y. 109.

the heirs on the death of B, and the personal estate to the administrator, it would not be possible for the administrator to carry out the contract. The court also held that the relationship between A and B was so personal that it could not be transferred.

§ 105. **Same: Future interests.** Where the right which is assigned has not yet arisen, but will arise in the process of time or by operation of law, it may be assigned. A mere expectancy, however, can not be assigned. For example, if A is employed by B, he may assign his wages to be earned in the future to a third person; but if he merely expects to secure employment with B, no contract of employment yet having been made when he assigned the right to his wages to C, C obtains nothing from such an assignment. A had no right to make the assignment, as it was but a mere expectancy (9).

§ 106. **Same: Contracts non-assignable in terms.** A contract may also be made non-assignable as a result of the agreement of the parties. Thus, if A and B in contracting for the sale and purchase of goods, stipulate in terms that the contract is not assignable, any transfer of the rights under the agreement without the consent of all parties concerned would be inoperative.

§ 107. **Same: Public policy.** Many claims are not assignable for reasons of public policy. Thus pensions, salaries of public officials, mere rights of action for personal injuries are not assignable, since to permit such assignments would tend to injure the public service, or defeat the purpose for which the grant was made, as in the case of the assignment of a pension.

(9) O'Keefe v. Allen, 20 R. I. 414.

§ 108. **Requisites of a valid assignment.** The law does not prescribe any precise form in which assignments must be made. It is essential that the assignor shall clearly express his intention to confer upon the assignee the authority to collect the particular obligation (10). An oral assignment is valid. Where the claim assigned is in writing, the surrender of the writing to the assignee would be the usual method. If the assignee gives a consideration to the assignor for the assignment, as is usually the case, he can compel the latter to take all the steps necessary to put the assignee in possession of the claim. If, however, A having a contract with B desires to make a gift of that obligation to C, and fails to execute a proper power of attorney to C, the latter is without remedy since the courts will not interfere to perfect an imperfect gift (11).

§ 109. **Notice to the debtor.** It is not necessary, so far as the rights between assignor and assignee are concerned, that notice of the assignment be given to the debtor, but it is essential in order to protect the rights of the assignee against third persons that such notice be given, since the original obligation still stands, and if the debtor in good faith pays the claim to the original creditor without notice of the assignment, he will be discharged (12). If, however, he has been notified of the assignment, he can not escape liability to the assignee by payment to the assignor (13). It is evident therefore,

(10) Risley v. Phenix Bank, 83 N. Y. 318.
(11) Tollman v. Hoey, 89 N. Y. 537.
(12) Heermans v. Ellsworth, 64 N. Y. 159.
(13) Littlefield v. Storey, 3 Johns. 425.

that notice is only necessary in order to protect the assignee against settlements between the debtor and the assignor.

§ 110. **Successive assignments.** The courts are not agreed regarding successive assignments. Thus, if A is indebted to B, and B assigns his claim to C and later assigns the same claim to D, a majority of courts would hold that the assignee first giving notice to the debtor would be entitled (14). On the other hand there are many decisions to the effect that the order in time of the assignments determines the rights of the parties. Thus C, who received the first assignment, would have a better right than D, whose assignment was later in time. It would seem, however, that their rights should be determined by the steps taken by intermediate assignee. Thus if A assigned a claim against B to C and afterwards assigned the same claim to D, if D before taking the assignment inquired of B whether or not a prior assignment had been made and B not having been notified of the transfer to C, assures him in the negative, D ought to prevail over C since the latter's failure to notify the debtor has misled D to his injury. Otherwise, if D took the assignment without inquiry.

§ 111. **Partial assignments.** Where A holds a claim against B for $500 and is indebted to C for $200, he may assign the entire claim to C, and when C recovers the amount he can retain the amount of his debt, but must account to the assignor for the balance. It is not possible, however, for A to assign $200 of the claim against B to C.

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(14) Wald's Pollock, Contracts (Williston's ed.), 281, note.

The objection is that there is but a single obligation on the part of B to pay A $500 and it would be contrary to the terms of the obligation as well as imposing a great hardship on B if A could split the demand up into a series of smaller demands, and render B liable in a suit on each item. In the case of partial assignments of claims against public corporations, as cities, the assignment is held invalid on still another ground, namely, that of public policy, the courts holding that it would seriously embarrass the administration of public affairs if claims of this kind could be split up (15).

While it is true that A can not split his claim against B by assignment so as to confer upon the assignee a right to sue at law, yet if the debtor is notified of the partial assignment and consents to it, the majority of courts permit the assignee to recover in an action at law (16). If he does not consent to it, nevertheless he will be liable in equity to the assignee if he pays the whole amount of the claim to the original creditor with notice of the partial assignment. While he is not bound to pay a partial assignment at law, he is bound to retain in his hands the amount represented by the partial assignment when he settles with the original creditor. A failure to do so will render him liable (17).

§ 112. **Negotiable contracts.** Third parties acquire rights under contracts in various other ways that are analogous to assignment, for example, in the case of negotiable paper where the holder of the paper transfers it to

(15) Delaware County v. Diebold Safe Co., 133 U. S. 473.

(16) James v. Newton, 142 Mass. 366.

(17) Bispham, Equity (6 ed.), Sec. 166.

another, the party acquires a right which is determined by the law governing negotiable instruments, and differs materially from the rights of the assignee. See the article on Negotiable Instruments in Volume VII of this work.

§ 113. **Assignments by operation of law.** In the case of bankruptcy proceedings, the assignee in bankruptcy is by operation of law substituted for the bankrupt in all claims on contracts due the bankrupt which are assignable in their nature. Where a person dies, his administrator or executor will in law be the assignee of all claims due the estate and he may proceed to collect the same in much the same manner as a voluntary assignee may do.

§ 114. **Rights of the assignee.** Since the assignee merely obtains the rights which his assignor has in the claim assigned, it follows that any defence which the debtor could have urged when sued by the creditor, he can likewise urge against the creditor's assignee. Thus the fact that the creditor was guilty of fraud in connection with the contract, or has been paid in whole or in part, may be set up by the debtor (18). The defence of set-off must arise before notice of the assignment, however, or it will not be available (19). To pay the original creditor after notice of the assignment would be a fraud on the assignee. So also to acquire any claims against the creditor with a view to setting them off against the original debt, will be ineffective if done with knowledge of assignee's rights (20). By virtue of the contract of assignment, the

(18) Miller v. Kreiter, 76 Pa. St. 78.

(19) Heermans v. Ellsworth, 64 N. Y. 159.

(20) Welch v. Mandeville, 1 Wheat. 233.

creditor agrees not to interfere with the assignee in the collection of the claim; hence accepting payment from the debtor after assignment will be a breach of contract, even though the debtor himself may be released as a result of a payment made in ignorance of the assignment.

CHAPTER VIII.

INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

§ 115. **Scope of subject.** Where parties to a contract are unable to agree as to the precise scope of the obligation, or are unable or unwilling for any reason to carry it out, the courts are usually called upon to determine the question for them. It may be presented in various forms. Is there a contract at all? If a contract, is it unenforceable for any reason? Granted there is an obligation of some sort created, what is its scope? What must the plaintiff do in order to enforce the defendant's promise? What has the defendant left undone that he must do to fulfil his obligations?

§ 116. **Problem of interpretation.** In solving these questions, the court must consider the terms of the agreement, if it be in writing, or the words and acts of the parties if the agreement be oral. It must take into account the circumstances under which the agreement was made; the meaning of technical terms; the customs or practices of a particular trade or calling to which the contract relates; to what extent the prior negotiations and dealings between the parties is to be considered as forming a part of the contract; what acts or words are to be ignored. In short, the court must by considering the language, acts, and circumstances of the parties with reference to this particular agreement decide what they meant, and give effect to that meaning. The court sits to enforce the con-

tracts which the parties have made and not to make contracts for them.

§ 117. **Rules of interpretation.** In performing their function the courts make use of certain rules to aid in arriving at the goal of their investigation, i. e., the ascertainment of the intent of the parties. These rules are not hard and fast and yield to the obvious contrary intent of the parties themselves. The statement that the court will carry out the intention of the parties must be qualified by the further statement that it will carry out not necessarily the actual intent or expectation of the individual parties, but the intent properly construed. Thus it may happen that the liability enforced is not the one the parties intended to assume, but if expressed in clear terms, the court is bound to give it the ordinary meaning.

§ 118. **Oral contracts.** Where the agreement sued upon is by word of mouth only, or partly written and partly oral, the court will receive in evidence all the facts known to the parties, the acts and words of the parties, and the agreement will be the final construction which the court puts on these acts and words.

§ 119. **Written contracts.** Where the agreement sued upon is in writing, another rule comes into play. Where the writing is executed in a formal way, and is drawn as a result of previous negotiation, it will be assumed to embody the will of the parties, and the court will not consider the acts or words of the parties prior to its execution that may be inconsistent therewith, since the final will of the parties is assumed to be embodied in the instrument.

§ 120. **Parol evidence rule.** Evidence will not be re-

ceived to add to or take from an agreement which the court finds to be complete. To do so would place every contract at the mercy of unscrupulous witnesses. Evidence will be admitted, however, to show that there is no agreement at all, as where a contract is only to be effective on the doing of an act by a third party, which act has not been done. Evidence will be received also to aid the court in determining the meaning of the contract. Thus the parties may use a phrase or a word that has a particular meaning in the business with which the contract is concerned; or where the language used is colloquial, and has a particular meaning in the particular community; or where certain terms are a usual part of similar contracts, as for example the usages or rules of the stock exchange. Evidence may also be received of a collateral agreement not inconsistent with the original contract. The application of the rule frequently involves fine distinctions, and it is sometimes difficult to say whether the particular evidence invades the parol evidence rule or not. The matter is discussed in the article on Evidence in Volume XI of this work.

In the case of written contracts, particularly, the court must rely mainly upon the language of the parties themselves, and will assume, where the parties use plain, unequivocal language having an accepted meaning, that the parties intended it in its ordinary and accepted sense.

§ 121. **Dependent or independent promises.** A makes a contract with B, by the terms of which A agrees to sell a horse to B, and B agrees to pay $500 therefor. B is unwilling or unable or hesitates to carry out his agreement. A desires to proceed against him for breach of contract.

The question presented to the court is essentially a question of interpretation. What in contemplation of law do the parties intend by this agreement? Three distinct results are possible. First, it may be said that the promises of A and B are entirely distinct and therefore A can sue B on his promise to pay $500, leaving B to sue A on the latter's promise to deliver the horse; secondly, it may be said that before A can recover damages from B, he must deliver the horse to B, or attempt to deliver it; or lastly, that he need not actually deliver the horse or even tender it, but must be ready and willing to do so, and notify B of that fact. The court must not only decide these questions, but must also determine the time when the contract was to be performed, no time being stated in the terms.

§ 122. **Independent promises.** Under the earlier conceptions of the law, the first alternative would be adopted, and A be permitted to sue B without a tender or offer of performance of any kind. The two promises would be regarded as independent of each other, and therefore the question of A's duties would be of no moment in deciding B's liability. This notion of the independence of promises had its origin in the law before mutual promises were recognized and enforced at all, and when undertakings were in formal instruments under seal. Thus, if A and B made a contract of purchase and sale, A would execute a promise under seal to sell his horse to B, and B would execute his promise under seal to pay A $500. This idea persisted even after mutual promises not under seal were recognized and enforced, the courts holding that while the promises were mutual, that is, given for each other, the performance of the promises was not, unless made so in

terms; hence, it was necessary to make the performances dependent in terms, in order to constitute a dependency of performance.

§ 123. **Dependent promises.** The modern view is distinctly contrary to this notion, the law presuming that where the promises are given for each other, the performances are dependent on each other also, unless by necessary implication from the facts or by direct provision they were made independent. Dealing with the above case from this view, the courts would say that since A gave his promise to deliver a horse to B in return for B's promise to pay $500, it will be assumed that A intended to give the horse only in the event that he received the money and conversely that B intended to pay the money only in the event that he received the horse. There being no reason on the facts of the case why both acts can not be done at the same time, and it appearing further that no provision is made for the extension of credit, they must be performed at the same time. Accordingly A could recover on B's promise by offering to perform, and without tendering or handing over his property to B. Hence, we have the rule of law that where mutual promises can be performed at the same time, they must be performed at the same time.

§ 124. **Time for performance.** Since the parties have not agreed upon any specific time for performance, it will be assumed that performance within a reasonable time is intended. The court must decide whether A offered to perform within a reasonable time after the contract was made. What is a reasonable time depends on the circumstances of each case, hence we have the rule of law that

where no time is mentioned in the contract, it must be performed within a reasonable time. If the agreement had provided that the horse was to be delivered on a certain date, as May 1st, the court would be relieved of the necessity of determining the time of performance, but the dependency of the promises will not be affected thereby. Since the sale was not on credit and payment can be given at same time as the time of delivery, it must be given at that time.

§ 125. **Where act on one side requires time.** A promises to manufacture a table of a certain design for B, and B promises to pay $50 for it. In this case it is obvious that since A's act requires time, it will not be possible for the two promises to be performed at the same time. B can not be compelled to pay until A's act is complete; therefore, A must finish the table before B can be requested to pay; hence, we have the rule that where the promise on one side requires time and the promise on the other side is to pay money, the act requiring time must be performed first.

§ 126. **Where one act is to be done first.** Although it may be perfectly possible for the mutual performances to take place at the same time as far as the acts themselves are concerned, yet the parties may indicate that one act is to be completed before the other is due. Thus, in the case of the contract by A to sell a horse to B, if the contract provided that the horse was to be delivered on a certain date and the money to be paid on a later date, it would be clear that B was entitled to the horse, without paying money at the time. A would be compelled to deliver on date named and if he did not, he would be liable

on the promise. A's promise is independent, while B's promise is dependent, since if A did not deliver the horse, B is not liable to pay. The same result follows on same principle, where the terms of the contract stipulate for credit.

§ 127. **Test of mutual dependency.** Promises that are given in exchange for each other are presumably dependent. It is difficult in many cases to decide this question. A leases a farm to B, and B contracts to pay rent. Obviously the transfer of the land to B is in consideration of the rent, and is dependent on it, and A could not recover rent if he did not execute the lease and give possession. Suppose in addition to the above promise, A has also promised to keep the premises in repair. He fails to do so, but sues B for rent. Can B set up the failure to keep in repair? His right to do so will depend on whether the covenant to repair was given for the covenant to pay rent. Obviously the covenant to pay rent was given for the lease itself, the covenant to repair is a collateral and subordinate covenant and B can sue upon it, but can not set up A's breach under it to defeat the latter's right to the rent. It is possible for the parties to make the performance of the collateral promise to repair dependent, but unless it is done in terms it will not be so considered.

§ 128. **Contracts conditional on satisfaction.** As a general rule express stipulations of the parties can not be disregarded. Thus A makes a contract with B to paint B's portrait. B promises to pay A $1,000 if the picture is satisfactory. A cannot recover the money until he has presented a picture that satisfies B. The fact that B is

unusually critical is immaterial, since A agreed to take the risk of B's approval.

If A can show that B is acting fraudulently in withholding approval, it would be possible to recover, since fraud would waive the condition. The mere fact that the picture was well painted and in the opinion of others was a good likeness would not show bad faith (1). In all cases where personal taste is involved, it is extremely difficult to show bad faith. Where personal taste is not involved so directly, as in a building contract which contains the common provision that no payments are to be made except on certificate of architect, the fact that the building was erected in a workmanlike manner according to specifications will be evidence that the architect was acting in bad faith in withholding the certificate (2). In some jurisdictions, the view has been taken that the builder can recover without a certificate, if he has in the opinion of a jury, done the work in a proper manner (3). This view ignores the provision as to the architect's certificate entirely, in effect makes a different contract for the parties, and can not be justified.

§ 129. **Notice of facts upon which performance depends.** When a performance on the part of one of the parties to the contract depends upon the happening of a certain event within the peculiar knowledge of the other party, it is the duty of the latter to disclose that fact; otherwise he can not hold the promisor liable. Thus in

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(1) Brown v. Foster, 113 Mass. 136.
(2) Chism v. Schipper, 51 N. J. L. 1.
(3) Nolan v. Whitney, 88 N. Y. 648.

Hayden v. Bradley (4) A rented property from B, and B covenanted to keep the premises in repair. It was held A could not sue B for failure to keep the premises in repair, unless he had first notified him that the premises were out of repair, and given B an opportunity to perform his promise. Where the fact on which the promisor's liability depends is not within the peculiar knowledge of the other party to the agreement, but is equally accessible to the promisor, he is bound to ascertain that fact. Thus, where A makes a contract with B to pay B a certain sum as soon as C returns from Europe, both A and B having equal facilities for ascertaining when C returns, B can recover against A without previously giving notice to A that C has returned, if in fact C has returned.

§ 130. **Implied conditions.** Where the parties themselves have not made the doing of an act by one party absolutely precedent to the liability of the other party, the court may, in passing on the agreement, hold A's act to be precedent to B's liability under some circumstances, and hold it not to be under other circumstances. Thus in Ritchie v. Atkinson (5) A, the owner of a vessel, made a contract with B to bring a full cargo of hemp from St. Petersburg to London and B agreed to pay a certain rate per ton freight. It appeared that A in good faith brought a cargo but not a complete cargo, which he delivered to B. The court held that, since A had substantially performed his agreement, it would work an injustice to him to treat his obligation to deliver a complete cargo as an

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(4) 6 Gray 425.
(5) 10 East 295.

act absolutely precedent to B's liability, and accordingly he was permitted to recover on the contract at the rate fixed in it, subject to a right on the part of B to set off any damages he had suffered in consequence of not getting the full cargo. It is to be borne in mind that if the parties had stipulated in this contract that the delivery of a complete cargo was an absolute condition precedent to any liability on the part of B to pay freight, the court could not have reached the conclusion it did without violating the actual agreement of the parties. But since it is possible in a particular case to treat these provisions as mere promises, and the result of so treating them will work justice between the parties, the court will adopt that view.

§ 131. **Where consideration is not apportioned.** If in the above cited case B had agreed to pay a lump sum as freight, the court would have found it impossible to allow A to recover on the contract, since it could not tell from the agreement itself the rate at which freight was to be paid, and for the court to fix the rate would be injecting a new term into the agreement; consequently the result reached in this case is only possible where the parties have so drawn their agreement as to make it possible to apportion the consideration to the act performed. Again, if in the preceding case it appeared that A had returned to London with a very small fraction of a complete cargo, so that to permit him to recover at all would impose a great hardship upon the defendant, the court would then consider the performance of A's promise as necessarily precedent to B's liability for the freight, since it would

impose greater hardship on B to enforce it than on A to defeat recovery.

§ 132. Installment contracts. Some difficulties have arisen as to the proper interpretation of installment contracts. Thus A makes a contract with B to purchase 1,000 tons of iron to be delivered at the rate of 200 tons a month until the entire amount is delivered, each installment to be paid for on delivery. The question presented is whether or not this is to be treated as one entire contract or as a series of separate contracts. If the latter view is taken, it would follow that the failure of A to deliver any particular installment or the failure of B to pay for any particular installment, would in nowise affect the rights of the parties under the other installments since they are to be treated as separate contracts. If, however, the contract is treated as an entire one for the delivery of 1,000 tons of iron, delivery by installments being inserted merely for convenience of the parties, then the question whether or not a particular installment has been delivered or paid for may affect the entire agreement. The generally accepted view is that contracts of this character are to be treated as entire (6). Suppose for some reason A fails to deliver the first installment. Can B thereupon refuse to receive any future installments, and set up A's failure to deliver the installment as a defense in a suit upon the entire contract? Whether he can do so would seem to depend on whether or not the injury occasioned by the failure to deliver one installment was of such magnitude as substantially to defeat the purposes for which B

(6) Norrington v. Wright, 115 U. S. 188.

made the contract, or was accompanied by conduct on the part of A which indicated to B that A did not intend to perform the agreement. Most of the English cases where the first question has arisen have dealt with the question as one of law, namely whether as a matter of law the failure to deliver one installment is a breach which will defeat the entire contract, and the English courts have generally held that such a breach does not necessarily go to the substance of the contract. It would seem that the question was really a question of fact depending upon the peculiar circumstances of each case. If the evidence shows that a failure to receive the installment has practically defeated the ends which the purchaser had in view in making the contract, the failure to deliver ought to constitute a good defense. If on the other hand, such does not appear to be the case, the plaintiff ought to be allowed to recover subject to any set-off which the purchaser may have as a result of not receiving the particular installment.

§ 133. **Same: Illustrations.** The English cases decide that if the failure to deliver a particular installment or pay for a particular installment is accompanied by language or conduct indicating an intent to repudiate the entire obligation, the injured party need not perform. Thus in Withers v. Reynolds (7), A contracted to sell B a quantity of straw to be delivered at certain intervals, each load to be paid for on delivery. After the delivery of one load B announced to A that he would thereafter hold back the price of one load until the contract was com-

(7) 2 Barn. & Adol. 882.

pleted. Since under the terms of the contract he was bound to pay for each load as delivered, the court found he had in effect repudiated the contract, and therefore A was justified in not delivering any more. Again in the cases of Freeth v. Burr (8) and Mersey Steel Co. v. Naylor (9), where there was a refusal to pay for a particular installment, the court held that the failure to pay was not a breach sufficient to entitle the other party to refuse to perform, since the refusal was in good faith, and in the belief that the party could not safely pay the seller owing to the financial difficulties of the latter, and the refusal was not accompanied by any acts or words intimating an intent to repudiate. The American cases for the most part have followed the decision of the United States Supreme Court in Norrington v. Wright (6) above, holding installment contracts to be entire contracts, so that the failure to deliver a particular installment at the time stipulated would justify the purchaser in refusing to continue the contract. The opposite view was taken in the case of Gerli v. The Poidebard Silk Mfg. Co. (10). Further illustrations of the problem whether or not a failure to perform a particular provision of a contract will justify the other party in refusing to perform, are found in Bettini v. Gye (11) and Poussard v. Spiers & Bond (12). In the first case A agreed to sing at B's theater, in opera, and also in concerts. He agreed to be present for rehearsals at

(8) L. R. 9 C. P. 208.
(9) L. R. 9 App. Cas. 434.
(10) 57 N. J. L. 432.
(11) L. R. 1 Q. B. D. 183.
(12) L. R. 1 Q. B. D. 410.

least two weeks before the opening of the concert season, but owing to illness, he was unable to appear until the time fixed for the beginning of his contract. B set this up as a breach which justified him in putting an end to the contract. The court held, however, that it did not appear that A was to begin his engagements by singing in rehearsal. It was, therefore, unnecessary for him to appear for rehearsals, and the breach was not one going to the substance of the contract. On the other hand, in the case of Poussard v. Spiers, A employed under a contract to sing in opera only, was unable to appear at the opening night of the opera season. Accordingly B put an end to the contract. It was held he was justified in doing so, since it was evident that the failure of a leading singer to appear at the opening night of the opera was a breach which would go to the very substance of a contract, and would justify B in putting an end to it, and making arrangements with other parties.

§ 134. **When the right of action accrues. Anticipatory breach.** Normally the right of parties to bring an action on a contract would be determined by the terms of the agreement itself. Thus, if A agrees to convey property to B on January 1st, and fails to do so on that date, B would have a right of action immediately. If, however, in October preceding A had announced to B that he would not convey the land, could B sue A at once? It would seem on principle he could not do so, since performance is not yet due; but the opposite doctrine has been developed largely in cases of contracts for personal service and contracts of marriage. Thus in Hochster v. De La

Tour (13), A made a contract with B to act as the latter's clerk beginning on June 1st. In May B notified A that he would not require his services, and A immediately thereafter brought an action against B for breach of contract. It was urged that A could not possibly have an action against B prior to the first of June when his services were to begin, but the court permitted recovery on the theory that since B had repudiated the contract, A could treat the contract as broken. The court announced that where one party to a contract to be performed in the future repudiates it, the other party may sue at once for a breach, or he can refuse to accept the repudiation, in which case the contract is kept open for both parties as before. Thus if A on receiving word from B that he repudiated the contract, had written to him insisting that the contract be carried out, B might afterwards call upon A to perform the services notwithstanding his former repudiation, since A's refusal to accept a termination of the contract kept it alive for both parties. The same rule was applied in the case of Frost v. Knight (14), where A agreed to marry B on the death of his father, and while his father was still living wrote to B repudiating the contract. The rule of these cases is obviously in conflict with the rule that prevails in damages, i. e. thus where A is notified by B that he will not perform his contract, A is bound to take steps to keep down the damages. Thus if A was building a table for B, and when the work was partially completed was notified by B that he would not take the table, A

(13) 2 E. & B. 678.

(14) L. R. 7 Exch. 111.

would be compelled to stop work on the same, and he could recover only for the work and labor already performed plus any profit he would have made in carrying out the contract.

Most American courts have followed the English decisions above noted to the extent of recognizing the right of a person to bring an action on a contract, the date for the performance of which has not yet arrived, as soon as the other party repudiated it (15).

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(15) Daniels v. Newton, 114 Mass. 530, is contrary to this.

CHAPTER IX.

REMEDIES FOR BREACH OF CONTRACT.

§ 135. **Available remedies.** Where one party to a contract unjustifiably fails to perform it, the injured party has a right of action. Either he may sue in a court of law and recover money damages, or sometimes he has an option to proceed in equity to have the contract specifically carried out by order of the court.

§ 136. **Money damages.** In the great majority of cases the only relief will be money damages. The inquiry of the court in such cases is to find what sum of money awarded to the injured party will place him in as good a position as he would have occupied if the defendant had kept his promise. Wherever the payment of money will secure this result money damages will be the plaintiff's only remedy.

§ 137. **Specific performance.** In many cases where money damages are not substantially the equivalent of the promised performance, the injured party may proceed in a court of equity to have the defendant's promise specifically enforced. Thus, where A has contracted to purchase land of B, A may wish the particular land as a homestead so that the money value of the contract would not represent the equivalent of the performance. Accordingly the court will order B to convey the land to A on receiving

the agreed price. Ordinarily this will be done with all contracts to convey land or to sell personal property that cannot readily be purchased in the market. Contracts for personal services will not be specifically enforced, like a promise to paint a picture, even though money damages are not an equivalent. The subject of specific performance of contract is fully discussed in the article on Equity Jurisdiction, Chapter II, in Volume VI of this work.

§ 138. **Money damages: Details of the remedy.** All questions concerning the measure of damages in actions for breach of contract, the consequences for which a recovery may be had, the certainty of proof required, various elements of damages, and special rules applicable to particular kinds of contracts are treated in the article on Damages in Volume X of this work.

PART III.

DISCHARGE OF CONTRACTS.

CHAPTER X.

DISCHARGE BY ACT OF THE PARTIES.

Section 1. Rescission.

§ 139. **By mutual agreement.** After parties have made a contract, if for any reason they desire to terminate their obligations, they may do so by mutual release (1). Thus if A contracts to build a house for B, the contract may be ended by mutual agreement. The parties give up their respective rights under the original contract. The new agreement must contain the essentials of a binding contract. The necessary consideration is found in the mutual giving up of rights under an old contract. It is not enough that B says he will give up all claims against A, since this would amount to a mere offer. To be effective as a rescission A must likewise surrender his rights under the contract (2). The original contract need not be rescinded in terms; if the parties enter into a further contract, which is wholly or partially inconsistent with the original, the latter is rescinded by implication. A contracts to build a house for B according to certain specifications. Afterward a further agreement is made which

(1) Collyer & Co. v. Moulton, 9 R. I. 90.

(2) King v. Gillett, 7 M. & W. 55.

changes the plans of the house; in as far as the new plans are inconsistent with the old, it rescinds the old contract.

§ 140. **Dependent relative rescission.** If the new contract is invalid for any reason, the question arises does the old contract remain in force? Thus, A makes a written contract with B for the purchase and sale of goods. Later an oral contract is made relative to the same subject matter. This contract is bad because it is not in writing. Is the old contract still to stand? It is possible for the new agreement to operate as a rescission if the parties so intend it, and it will so operate if it expressly rescinds it; but it will not rescind it by implication, since the courts will assume that the parties intended to make a contract, and intended that, if the new agreement is ineffective, the original one shall stand (3).

§ 141. **Rescission for a default under the contract.** Where one of the parties to a contract has substantially failed or refused to perform within the time stipulated, the party not in default may treat the contract as at an end, save for his right of action on the defaulting party's promise; thus if A contracts to build a house for B and fails to proceed, B may elect to treat the contract as ended and may also sue A on his promise.

Section 2. Release.

§ 142. **Release.** The right of action can be released by an instrument under seal signed by B in those jurisdictions where seals are recognized. In some states where seals are abolished an unsealed release is effective.

§ 143. **Covenant not to sue as a release.** Where the

(3) Noble v. Ward, L. R. 2 Exch. 135.

creditor promises never to sue, the promise is regarded as equivalent to a release; if the promise not to sue is for a shorter period, it will not operate as a release but at most as a suspension of the action.

Section 3. Accord and Satisfaction.

§ 144. **Accord and satisfaction: Unilateral.** If A is indebted to B for $500 which is due and B promises to release the debt if A will deliver to B a horse, B may nevertheless sue upon the original debt before the horse is delivered, and may even refuse the horse if tendered, the reason being that B's promise is a mere offer which may be withdrawn at any time before acceptance by A (4).

§ 145. **Same: Bilateral.** If in the above case the parties mutually promise to deliver the horse and release the debt, B can still sue A for the $500, and the new contract will not be admitted as a defense. Since the parties have not agreed that the new contract shall take the place of the old obligation (5), the court will not allow the new agreement to be set up, since if received it would be in law a complete bar to any further action on the original contract (6), and if A did not deliver the horse, B's only remedy would be for breach of promise to deliver, while he only intended to forego his rights under the old agreement in case the new promise was carried out. Hence, we have the general rule that the new agreement technically known as an accord, can not be set up as a defense to an action on the original contract. Yet if the new

(4) Kromer v. Heim, 75 N. Y. 574.
(5) Morehouse v. 2nd Nat'l Bank, 98 N. Y. 503.
(6) Ford v. Beech, 11 Q. B. 852.

agreement is carried out, we have an accord and satisfaction which is a good defence to a suit on the original debt. The accord, however, is itself a perfectly good contract, and when violated by the suit on the original contract may be sued upon by A.

§ 146. **Equitable relief.** It has been suggested by text-writers and a few courts that a court of equity should enjoin an action on the original contract pending the performance of the accord, since this would not destroy the original agreement but merely suspend the remedy as agreed, but little authority can be found to sustain the proposition (7).

§ 147. **Conditional satisfaction.** Where the debtor gives his note for a debt due, it is not presumed that the original obligation is discharged. While it is evident that the creditor is willing to forgive the old promise if the new promise is performed, it will not be assumed that he is willing to rely on the new promise exclusively. Accordingly when the new obligation becomes due, and is not paid, the creditor may sue either on the new promise or the original one at his election. The above is the rule in the absence of a clear intent of the parties to put an end to the old transaction.

§ 148. **Instruments under seal.** At common law an instrument under seal could not be discharged by an accord and satisfaction by reason of the rule that a sealed instrument could only be destroyed by an instrument of like dignity, i. e., an instrument under seal. Under the

(7) Wald's Pollock, Contracts (Williston's ed.), 833; Hall v. 1st National Bank, 173 Mass. 16 (contra).

rule that equity disregards form, if a complete accord and satisfaction is shown the courts will enjoin the action at law (8). In states where the practice permits equitable pleas, the same result is now reached by setting up the defence in an action on the sealed instrument by way of equitable plea. In consequence, an accord and satisfaction is a good defence to suits on sealed instruments as well as parol obligations.

§ 149. **Accord and satisfaction by implication.** Accord and satisfaction may be inferred from the conduct of parties where there is no express agreement. Thus, A has a claim against B which is unliquidated. He makes a demand for $50 which he conceives to be the amount due. B sends his check for $25 stating it is payment in full. A retains the check and notifies B that he will apply the same on account and hold B for the balance claimed. If A sues B for the balance, the majority of American courts hold this to be a good accord and satisfaction, the retention of the check being regarded as an acceptance of the terms on which it was sent (9). The English courts hold that the mere retention of the check will not be sufficient evidence to sustain an accord and satisfaction (10).

Section 4. Novation.

§ 150. **Definition.** Subsisting obligations under a contract may be destroyed by the substitution of new parties for one or both of the former parties to the original obli-

(8) Steeds v. Steeds, L. R. 22 Q. B. D. 537.
(9) Nassoiy v. Tomlinson, 148 N. Y. 326.
(10) Day v. McLea, L. R. 22 Q. B. D. 610.

gation. This method of rescission is known in law as a novation.

§ 151. Substitution of parties. A substitution of parties is accomplished by the creation of a series of new agreements by the terms of which one of the original parties is released, and in consideration thereof, the new party assumes the obligation. To be valid all the parties to the new and old contracts must be parties to the new agreement. Thus, if A owes B and it is desired to substitute C in A's stead, the parties meet together and in consideration that B release A, C promises to assume the debt. As a result B's claim against A is wiped out, and a new contract on the same terms arises between C and B. It is not essential that A be an actual party to this arrangement, but it seems necessary that C be authorized by A to enter into the contract and to act as his agent, since it would be officious for a stranger to step in and pay A's debt to B and consequently not binding. In some cases it has been held that a subsequent assent would amount to a ratification of C's act, but inasmuch as C does not purport to act for A, it is difficult to sustain the result on any theory of ratification. Very slight evidence is enough to show the consent of the original debtor (11).

The most difficult question in the cases is one of fact to determine whether or not the creditor really intended to release the debtor (12). The question is commonly presented in this form. A is a creditor of the firm of B and C. It is agreed between B and C that C shall retire from

(11) Corbett v. Cochran, 3 Hill 41.

(12) Cochrane v. Green, 9 C. B. (N. S.) 448.

the business and as part of the consideration for his interest, B agrees to assume the debts of the firm and A is notified of this arrangement and assents to it. It would seem that this would not constitute a novation unless A agreed in terms to release C from liability on the firm's debts, and that an intent to give up legal rights should not be assumed merely because of a general assent by the creditor to the arrangement. In some jurisdictions if A does agree to release C, and accepts B as a debtor, the consideration consists in giving up a joint right against B and C, and accepting in lieu thereof the individual liability of B which is different in legal contemplation from the joint liability of B and C (13).

In jurisdictions where third persons are permitted to sue upon contracts made for their benefit, it would seem that the agreement would lack consideration since B and C have already contracted that B shall pay C's debts, and as A could sue upon this agreement a subsequent promise by B to pay him would not constitute a consideration for the release (14). In order that a novation shall be valid, it is essential that the original obligation shall be an enforceable one; otherwise the surrender of it will not constitute a consideration (15).

§ 152. **Substitution of creditors.** Where A has a claim against B, which is to be turned into a claim of C against B, it is necessary that two steps be taken: first, A must assign his claim against B to C, and then C must

(13) Lyth v. Ault, 7 Exch. 669.
(14) Kelso v. Fleming, 104 Ind. 180.
(15) Scott v. Atchison, 36 Tex. 76.

enter into a contract with B by which, in consideration of A's release of the assigned claim, B promises to pay C. The consideration is the giving up of the assigned claim.

Where A owes B and B owes C, and it is desired to substitute B and C for A and B, C makes a contract with B, his debtor, never to sue him, in consideration that B assigns his claim against A to C; C now being the owner of the claim makes a contract with A by which he promises never to enforce the assigned claim in consideration of A's promise to pay C. The result is that B drops out of the transaction entirely, a new contract arises between A and C, and two debts are thereby extinguished.

CHAPTER XI.

ILLEGALITY.

§ 153. **Illegal contracts.** Any agreement which has for its purpose the violation of the law, or which will indirectly result in such violation or in the invasion of some established rule of public policy is illegal, and is treated in law as void. It is not necessary that the illegality be criminal, that is, punishable by the state. It is enough that it violates private rights or a public policy not yet enforced by criminal laws. The fact that the parties to the agreement are innocent of wrongful intent is immaterial, in general, if it is clear that the promises when carried out will result in an illegal act. The law will not presume that the parties intend an illegal act. Its illegality must be shown by clear affirmative evidence. If the contract can be performed in two ways, one legal and the other illegal, the law presumes, in the absence of proof to the contrary, that the legal method was intended and will be adopted. In Waugh v. Morris (1) A chartered B's ship to carry a cargo of baled hay from a port in France to the port of London. Without knowledge of the parties, a regulation was adopted forbidding importation of hay from French ports. It was held, however, that the contract was not illegal, since it did not necessarily

(1) L. R. 8 Q. B. 202.

mean that hay was to be landed in London. It might be transshipped from the vessel in the port of London and shipped abroad, and the court would presume this was the thing intended in the absence of proof to the contrary.

§ 154. **Gaming contracts.** Wagers or bets are illegal and void in most jurisdictions, and consequently any contract which has for its object the furtherance of a wager is illegal. The agreement must be so closely connected with the thing forbidden as to make the contractor a party to it. Thus A loans money to B, a gambler, knowing him to be such, and suspecting that he will use it for gaming purposes. He can nevertheless recover the money, as his knowledge of the character or occupation of B will not make him a party to an illegal act by B. If the money was loaned for the express purpose of gaming, the loan is vitiated by the illegal purpose (2).

§ 155. **Commercial wagers.** A makes a contract through a broker for the purchase of barley for future delivery. When the time comes for delivery no grain is delivered, but the difference between the price agreed and the market price is paid to vendor. If the original contract was made with no intention of making a delivery, the contract would amount to a wager as to the future price of barley and would be illegal, but if delivery in good faith was intended when the contract was made, then a subsequent settlement of differences would not make the contract illegal (3).

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(2) M'Kinnell v. Robinson, 3 M. & W. 434

(3) Pixley v. Boynton, 79 Ill. 351.

If one of the parties contemplates an actual delivery, the fact that the other one does not is immaterial. Evidence of previous contracts between the same parties, the business in which each one is engaged, the facilities of the purchaser to receive and store the particular commodity will be received for the purpose of throwing light on the intention of the parties in a particular transaction.

§ 156. **Insurance contracts as wagers.** Contracts of insurance, either marine or fire or life, will be regarded as wagers and illegal if the parties insured do not have an interest in the property or life insured (4). In the case of life insurance, however, it is not necessary to the validity of the policy that the insured have an interest in the life at the time of the death of the person on whom the insurance is issued. Thus where a creditor insures the life of his debtor, and the debt is afterwards paid, the creditor can still recover on the policy in the event of the death of the debtor, although at the time of his death, he had no interest in the life of the debtor (5). See Insurance in Volume VII of this work.

§ 157. **Furtherance of illegal purpose.** The sale of an article with the knowledge that it will perhaps be used for an illegal purpose is valid, but if the vendor furthers that purpose by the manner in which he packs or marks the goods, he is party to an illegal act and the agreement is void. Thus in Hall v. Ruggles (6), A was selling prize packages of candy for purposes forbidden by law, since

(4) Warnock v. Davis, 104 U. S. 775.
(5) Amick v. Butler, 111 Ind. 578.
(6) 56 N. Y. 424.

it was a lottery. B sold candy and silverware to A and delivered it put up in the packages ready for the lottery. The court said mere knowledge of the illegal purpose would not affect B, but by putting up packages as he did he must be regarded as taking part in the illegal affair. Where the illegal thing furthered is of unusual turpitude such as rebellion against the government, it has been held that knowledge of the probable use of the thing sold will be enough to vitiate the contract (7).

§ 158. **Agreements in restraint of trade.** It has long been a settled principle of common law that contracts in unreasonable restraint of trade are illegal and void, since it is against the interest of the state to permit its citizens by contract to bind themselves not to exercise skill in their chosen calling.

§ 159. **Valid restraints: Trade secrets.** On the other hand restrictive agreements of a certain character have long been recognized as valid. Thus the manufacturer of a medicine may have a secret formula for preparing it. It is vital to his business that the secret be protected and the law will aid him in preserving it by enjoining his employes from disclosing it or using it in a rival business (8).

§ 160. **Same: Good will.** Frequently one of the important elements of value in an established business is its good will, which may be defined as the probability that persons who have previously patronized the business will continue to do so. It is recognized as a property

(7) Hanauer v. Doane, 12 Wall 342.

(8) Fowle v. Park, 131 U. S. 88.

right and will be protected. Any contract that has for its purpose the protection of the good will of a business, and is reasonably designed for that purpose will be enforced. In Bishop v. Palmer (9), A was engaged in the manufacture of cotton waste and bed quilts. He sold the business to B and agreed not to engage again in this business. It was held that the contract was illegal being in unreasonable restraint of trade. Such a sweeping restriction was unnecessary to protect the good will of the business. The earlier decisions laid down the rule that covenants of this character, unlimited in time or space, were illegal. To comply with this rule a sweeping covenant was framed by which the promisor agreed never to engage in the same business except in a designated territory. Thus in Diamond Match Co. v. Roeber (10) A agreed not to manufacture matches except in Nevada, and the covenant was sustained under the above rule. The later decisions disregard this test as artificial and hold that the validity of the covenant must be determined by the scope of the business which has been sold. Thus where the business sold is purely local to a city or town or even a part of a large city, a covenant not to engage in the same business within an area much larger than necessary to protect the business will be void. In Herreshoff v. Boutineau (11) the court applied this test and held that an agreement by a language teacher not to teach for one year in the state of Rhode Island was illegal, since it was much

(9) 146 Mass. 469.
(10) 106 N. Y. 473.
(11) 17 R. I. 3.

broader than necessary to protect the interest in question. On the other hand, if the business is international in its scope, a covenant of similar scope to protect the good will will be sustained. In Nordenfelt v. Maxim-Nordenfelt Gun Co. (12) the court sustained a sweeping clause of this character on the ground of the unlimited scope of the business sold.

§ 161. **Statutory prohibitions.** Agreements are frequently entered into by dealers in a given commodity, the object of which is to advance prices by curtailing production or limiting competition. In practically every state today statutes exist which prohibit agreements of this character and pronounce them void. The national government has a sweeping statute of the same character commonly known as the Sherman anti-trust act (13), providing that every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal.

§ 162. **Rule in the absence of statute.** In the absence of statutes of the above character, contracts designed to raise prices or curtail the production of a commodity were invalid if the subject matter was an article of prime necessity, such as flour, bread, provisions, or fuel, but binding if not involving such articles (14). The later cases, however, as a rule ignore this distinction and regard contracts of this character illegal merely because

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(12) L. R. (1894) App. Cas. 535.

(13) 26 U. S. Stat. 209.

(14) Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Central Shade Roller Co. v. Cushman, 143 Mass. 353.

of their restrictive purpose. In More v. Bennett (15) an association formed for the regulation of rates to be charged by stenographers was held invalid, although it did not violate any statutory provision.

§ 163. **Agreements tending to defeat the administration of justice: Stifling prosecution.** It is the duty of a citizen to aid in the enforcement of law, consequently any contract which has for its purpose the stifling of criminal prosecution is illegal. Thus if A is charged with theft from B, an agreement whereby B agrees not to appear against A in consideration of money paid by A or on his account is void (16). Where A has stolen property from B the act constitutes an invasion of B's rights as well as a public offence. B can sue A for the loss in a civil action, or settle with A, and the settlement will stand unless it appears that B has expressly or impliedly agreed not to prosecute A criminally. In all states compounding a felony is an offense in itself, and consequently any agreement with that object in view would be criminal, but even if such a law did not exist, the contract would be void as tending to defeat the administration of justice.

§ 164. **Same: Exceptions to above rule.** It frequently is necessary in the administration of justice where several parties are charged with a crime, in order to convict any of them, to absolve one of the accused on condition that he will testify freely against his companions. Such an agreement is within the discretion of the court and

(15) 140 Ill. 69.

(16) Williams v. Bayley, L. R. 1 H. of L. 200.

prosecuting attorney and may be allowed. It is really not sustained as a contract, but on the theory that the case is dismissed as a reward for the evidence given (17).

§ 165. **Same: Champerty. Modern rule.** The law does not look with favor on the institution of baseless litigation. The expense of bringing and maintaining a suit deters persons from bringing action on groundless and doubtful claims. Any agreement which removes this risk and consequently tends to encourage litigation is illegal. Thus, A may have a claim against B which is so doubtful that he would not take the risk of suing upon it. An attorney agrees with A to sue upon the claim, pay all expenses of the suit, and receives as his compensation a share of the proceeds of the suit, if successful; and nothing, if not successful. Such an arrangement removes all responsibility from A and the action amounts to a speculation. Such a contract was known in law as a champertous agreement and is void.

The rule as to champerty has been generally relaxed under modern decisions and a majority of the courts now recognize that an agreement by which the attorney is to receive a contingent fee, i. e., a certain part of the avails of a suit or an amount fixed with reference to the amount recovered, is valid as long as the attorney does not agree to pay the expenses and costs of the action (18).

§ 166. **Same: Maintenance.** Where A, a stranger to B, promises to pay all expenses if B will bring suit against C, the agreement is illegal for the same reasons

(17) Nickelson v. Wilson, 60 N. Y. 362.
(18) Blaisdell v. Ahern, 144 Mass. 393.

as a champertous contract. Such an arrangement is known in law as maintenance. Where A is interested in the suit or related to B, the agreement is valid.

§ 167. **Agreement to influence public officials.** Agreements by which A for a consideration agrees to present B's claim to a legislative committee, a commission, or a court, are valid provided the undertaking is merely to present the claim on its merits (19). If, however, the agreement contemplates the use of the personal influence of the promisor or the exerting of pressure not connected with the merits of the particular case, the agreement is bad. In Trist v. Child (20) A contracted to press B's claim against the United States then pending before Congress, and it appeared that A was to secure the passage of the claim by personal influence with members of Congress, irrespective of the merits of the claim. The agreement was accordingly held illegal. Where a person or corporation is charged with a duty with respect to the public interest, as where railway companies are charged with the duty of locating their road and establishing stations at points which in their judgment best serve the public convenience, a contract by which for a consideration they agree to locate their road and establish stations at points agreed upon with private persons, is illegal as against public policy. The fact that the location selected really is reasonably convenient for the public is immaterial, since the vice of the transaction consists in foregoing the exercise of the discretion reposed

(19) Houlton v. Nichol, 93 Wis. 393.
(20) 21 Wall. 441.

in them with respect to a public interest (21). The same rule applies as to the discretion to be exercised by a public official. Thus where A, the postmaster at X, agreed to locate the post-office on property adjacent to B's store in consideration of B's promise to pay part of the rent, the agreement was held illegal (22). Other agreements which tend to injure the public service and are illegal for that reason are agreements to use personal influence to secure an election or appointment to office (23).

§ 168. **Restraint of marriage.** Agreements which threaten the security of an institution recognized and encouraged by the state are illegal as against public policy. The institution of marriage is of this class; accordingly agreements between married people for future separation, contracts not to marry, or marriage brokerage contracts, are void as tending to injure the marital relation.

§ 169. **Contracts to defraud third persons.** Where a contract is entered into between two parties which has for its object or results in a fraud on a third person, the agreement is illegal and no recovery can be had. In Holcomb v. Weaver (24), A engaged B to secure a competent contractor to erect a house for him. B engaged C and made a contract with him by which C was to pay B a sum of money for procuring the contract. In an action by B against C to recover the amount promised, the court held the contract illegal, since the transaction was a fraud on A. He had relied upon and was entitled to the best

(21) Woodstock Iron Co. v. Richmond Extension Co., 129 U. S. 643.
(22) Woodman v. Innes, 47 Kan. 26
(23) Gray v. Hook, 4 N. Y. 449.
(24) 136 Mass. 265.

judgment of B in selecting a competent contractor. B by recommending C for a consideration violated this, and the result was fraud on A.

§ 170. **Sunday contracts.** In most jurisdictions statutes exist prohibiting work, labor, and business on Sunday except works of necessity and charity, and hence a contract made on Sunday which does not come under the head of necessity or charity may be illegal. These statutes have been construed very strictly in some jurisdictions, and in consequence, the authorities are much in conflict, so that it is impossible to lay down any general rule as to the result of such agreements. It is common to permit a recovery for the value of service performed or property transferred as a result of the Sunday contract, the courts taking the view that these contracts, while illegal, are not immoral, and therefore they are disposed to limit the effect of such statutes (25).

§ 171. **The effect of illegality.** As a general rule, the law will not interfere to aid either party to an illegal contract for the purpose of adjusting their rights under it. The parties are compelled to submit to the predicament which their own illegal acts have brought about, however unequal those results may be. This rule arises from the fact that the parties entering into such a contract have contemplated the violation of the law, and therefore can not expect the aid of the law to extricate them from their difficulties. To this rule there are certain exceptions.

§ 172. **Where the contract is divisible.** If it be possible to separate the illegal part of the contract from the

(25) Greenhood, Public Policy, 546.

legal part, the courts will frequently permit recovery on the legal portion. Thus if A agrees to pay $1,000 to B for his stock of goods and also $500 to B for an agreement on B's part never to re-engage in the business, the second part of the contract is bad because of the unlimited restriction imposed by the covenant. This first part, however, can be enforced since the value of the first promise is fixed by the agreement of the parties. Even where the consideration is entire, that is, where A agrees to pay a lump sum of $1,000 for the stock of goods of B and the covenant of B not to re-engage in the business, while the covenant not to re-engage in the business is illegal, yet if A is willing to pay the $1,000 for the stock of goods, he is entitled to insist that B shall carry out his contract (26).

A person who promises to do a legal and an illegal act in consideration of a lump sum can not recover for the legal act unless it can be separated from the illegal act. Thus A was employed as a waiter in a billiard hall operated by B. The conduct of the billiard hall was a legal business, but in addition to this, B was engaged in the illegal sale of liquors on the premises. A's contract provided that he was to perform services in both the legal and illegal business. The amount which he was to receive for the legal act was not separated from the amount he was to receive for the illegal act, and the court held, accordingly, that he could not recover at all (27).

§ 173. Where the act is highly immoral. Where the

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(26) Fishell v. Gray, 60 N. J. L. 5.

(27) Bixby v. Moor, 51 N. H. 402.

parties enter into a contract involving legal and illegal acts and the consideration is apportioned to these acts, it has been held that a performance of the legal act will not give rise to a cause of action, where the illegal acts were of a highly immoral character (28). A agreed to pay B $50 if B would dig a ditch across A's land and secure the dismissal of an indictment against A. The court held that dismissal of the indictment was highly immoral, tending to defeat the administration of the criminal law, and for that reason A could not recover against B for not digging a ditch.

§ 174. **Acts forbidden or penalized by statute.** Frequently a statute will impose a penalty for doing a certain act but does not declare the doing of such an act to be void, and it becomes necessary to determine the proper construction of such a statute. It may be a mere revenue provision which in effect says to the parties, "You may do the act on paying the price named in the statute." On the other hand it may be intended as a punishment for the act which is also regarded as illegal. It has been suggested as a test that where parties may continue to do the act without further liability under the statute, it is to be construed as a revenue provision merely, but where an additional act subjects him to a further penalty, it is to be regarded as prohibitory of the act itself.

§ 175. **Intention of parties immaterial.** If the object of the agreement is unlawful, either by reason of an express violation of the statute or because it invades some

(28) Lindsay v. Smith, 78 N. C. 328.

rule of public policy, the agreement is void, regardless of the intent of the parties to it (29). The purpose of the parties in entering into the agreement is immaterial where it is clear that the agreement if carried out will be a violation of the law.

§ 176. **Right of innocent party.** If one of the parties to a contract does not know of the illegal purpose to which the subject matter of the agreement is to be put, he can recover on the agreement. This is illustrated by cases already referred to where money is advanced which is used by the borrower in a gambling transaction. If the lender does not know of the gambling transaction, and does not loan the money for the express purpose of being used in gambling, he can not be regarded as a party to an illegal transaction and may recover on the borrower's promise. It is to be borne in mind that a mere knowledge that the property is likely to be used for an illegal purpose is not enough, under the decisions of the American courts, to implicate the lender.

§ 177. **Negotiable paper given for illegal purposes.** If negotiable paper is issued as a result of an illegal transaction, and a suit is brought upon it by the original parties, the illegal purpose may be shown to defeat the action. If, however, the paper is transferred to a bona fide purchaser for value without notice of the illegal inception of the paper, he may recover upon the paper under the law governing negotiability. If, however, a statute declares the transaction is illegal, and provides that all transactions within the prohibitory act are void, even a

(29) Harriman v. Northern Securities Co., 197 U. S. 244.

bona fide purchaser can not recover on the paper since it is treated in law as never having a legal existence. In New v. Walker (30) a statute provided that all vendors of patent rights must file with the clerk of the court verified copies showing their right to the patent, and any negotiable paper issued for a patent should provide on its face, "Given for patent right." A gave a negotiable note to B in return for a patent right, which did not contain this provision on the face of it, and the paper afterwards came into the hands of C, an innocent person. It was held that he could recover since the paper itself did not give him notice that it came within the statute and he did not have knowledge from any other source (31). See the article on Negotiable Instruments in Volume VII of this work.

§ 178. Parties not in equal fault. Where the parties are not in equal fault in an illegal contract, and the agreement does not involve moral turpitude, the courts will frequently permit the innocent party to recover (32). A was seeking to make a settlement with his creditors and all had agreed to accept fifty cents on the dollar and release their claims except B. B refused to enter into the arrangment unless he was given an additional compensation which A paid him. A was permitted to recover back the money on the ground that his situation was such that he was pressed by B. In general, it may be said that where the party has been induced to enter into a contract without knowledge of its illegal charac-

(30) 108 Ind. 365.

(31) 1 Daniel, Negotiable Instruments, Sec. 197.

(32) Tracy v. Talmage, 14 N. Y. 162, 181.

ter, or by fraud or duress or undue influence, the court will relieve him from the agreement. In Duval v. Wellman (33) A entered into a contract with a marriage broker by which she paid the broker $50 in return for his undertaking to find a suitable husband for her. She afterwards brought an action to recover back the money and the court permitted her to do so, holding that agreements of this character are prima facie induced by undue influences, and that to rescind the agreement will serve to prevent the consummation of illegal acts and therefore should be allowed.

§ 179. **Where the illegal purpose is not consummated.** Since the purpose of the law in refusing recovery on illegal contracts is to discourage the making of such agreements, if the contract is still executory, and the primary purpose will be best realized by permitting recovery, the law will do so. In Block v. Darling (34) A turned over property and money to B for the purpose of defrauding A's creditors. The transaction had not been consummated and it was held that A might recover back the money since to permit him to do so would defeat the illegal purpose. It is, therefore, a question in each case whether the recovery will not tend to prevent illegality and if it clearly will do so, the court will permit a recovery.

§ 180. **Recovery from a stakeholder.** Where A makes a bet with B and the money is put into the hands of C as a stakeholder, before the money is paid over by C to

(33) 124 N. Y. 156.
(34) 140 U. S. 234.

the winner either party, on notifying him that they have revoked the transaction, may recover back the money from the stakeholder, and if he does not pay it over after such notice, he is liable. The theory of recovery here is the same as in the preceding case, namely, that recovery tends to discourage illegal acts (35). In many jurisdictions statutes provide for the recovery by the party of funds held by the stakeholder.

§ 181. **Conflict of laws.** A contract may be made in one state to be performed in another, and may be sued upon in a third. The contract may be legal or illegal in some of these states and not in the others. The law applicable to such problems is discussed in the article on Conflict of Laws in Volume IX of this work.

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(35) Hampden v. Walsh, 1 Q. B. D. 189; Bernard v. Taylor, 23 Ore. 416.

CHAPTER XII.

IMPOSSIBILITY.

§ 182. **Risk of loss.** Where a person gives a promise to do an act in the future, he is generally held to have assumed all the risks incident to that performance. Thus in case of building contracts, the contractor assumes the risk that the prices of material and labor will advance; that the building before completion may be destroyed by fire; or that the ground on which the building is erected may be of so unstable a character as to necessitate increased expense on his part. All these risks are incident to the contract and are taken into consideration by every careful person in making a contract to be performed in the future. It applies not only to building contracts, but to all agreements for future performance.

§ 183. **Absolute impossibility.** Where the thing undertaken is absolutely impossible of performance, according to human experience, the agreement will be void. Thus an agreement by which A promises to put his finger against the sky in return for B's promise would be void because of its physical impossibility. Such agreements are regarded as merely illusory.

§ 184. **Impossibility known to one party only.** If the act to be performed is one physically possible but for some reason is impossible of performance, and that impossibility is known to only one of the parties to the agree-

ment while the other party in good faith entered into the agreement, the contract, while unenforceable, yet will give rise to liability in favor of the person who has acted in good faith in ignorance of the impossibility. Thus A, a married man, enters into a contract to marry B. B is ignorant that A is married and enters into the agreement in perfect good faith. B will be permitted to recover damages for breach by A, but the action is really based not on the contract, although it may be so in form, but on the fraud of A in inducing B to enter into such an arrangement.

§ 185. **Subsequent impossibility.** Where the act which the parties have undertaken becomes impossible of performance subsequent to the contract, the question arises whether the risk of this impossibility is assumed by the party undertaking to perform the act, or whether he is excused from further performance by reason of the impossibility. In determining this question, the court must consider the intent of the parties, and the nature of the event which creates the impossibility. If it appears that the impossibility was due to some act which ordinarily might be anticipated, and would be regarded by a prudent person as one of the risks to be taken into account when the contract is made, the promisor will not be excused. In Superintendent v. Bennett (1) A contracted to erect a school house for B. Owing to latent defects in the soil, the building fell down when partially completed. The court held, however, that this was not a defense to an action on the contract by A, since it was his business to

(1) 27 N. J. L. 513.

take into consideration the nature of the soil, and he must be held to assume the risk of it, it being one of the incidents of such a contract. It is generally held that parties will not be presumed to assume risks which are beyond human experience or control. While a person may be assumed to contemplate the intervention of circumstances, as in the preceding case, yet if the impossibility is created by some circumstance beyond ordinary experience, the court will assume the parties did not intend to take the risk of this, unless they did so in terms or by clear implication. Various illustrations of the rule appear below.

§ 186. **Acts of God.** A makes a contract to serve B for a period of time as clerk. Shortly after entering the service he becomes ill, and is unable to carry out this agreement. A will not be held liable for failure to perform, since his failure is due to an act beyond his control; and the courts will assume, in a contract for personal service, that the parties intend the agreement not to be binding on either party if it is prevented by the sickness, death, or insanity of either (2). Sickness is commonly spoken of as an act of God, and it is said that where a performance is prevented by act of God, there is no liability, unless the risk is assumed in terms.

An act of God as used in this connection means an event which as between the parties and for the purpose of the matter in hand can not be definitely foreseen or controlled (3). It would seem under this definition of an act

(2) Yerrington v. Greene, 7 R. I. 589.

(3) Wald's Pollock, Contracts (Williston's ed.), 535.

of God, that the question in each case is one of interpretation as to what risk the parties intended to assume, and what not to assume. Since acts of God are usually extraordinary and uncontrollable acts, it is held that they are not contemplated by the parties and hence their occurrence excuses performance.

§ 187. **Impossibility known to delinquent party.** If the impossibility was known by the party who seeks to set it up as a defense, he can not thus use it. Thus, if the illness of a party to a contract for personal services is set up, and he was aware at the time of entering into the contract that he would be incapacitated for performance before the completion, the failure to perform will be regarded as his own fault and not an act of God. The impossibility may be due to illness of which the defendant was aware, but which it was reasonable to believe was but temporary in its character, in which case it may ordinarily be set up as a defense. Thus A contracted to marry B. At the time of the contract he was suffering from a curable disease. After the engagement the disease became chronic, rendering him unfit to marry, and it was held that this would constitute a defense (4).

If both the parties know that one of them is suffering from an incurable disease, they may be taken to have assumed the risk and to intend that the contract be carried out in spite of such disease. The only possible ground of defense would be that a marriage between parties thus situated would be against public policy. The courts have not taken this ground to any extent. Thus

(4) Sanders v. Colman, 97 Va. 690.

in Hall v. Wright (5) A sued B for breach of promise of marriage. B defended on the ground that he was afflicted with a disease that would make marriage dangerous to life. The majority of the court held that the fact that inconvenience or danger to one of the parties would result from the marriage was not enough, since B could still give A social standing by marriage and a position as his wife, and if A desired the contract to be carried out, B must either carry it out or pay damages for breach. This case would probably not be followed in the United States generally (6). Where a person agrees to marry and by reason of some physical defects is incapable of a valid marriage, the liability would seem to rest on tort, since the court would not give damages for breach of an agreement that if carried out would be annulled. The same rule should apply as where a person already married enters into a contract to marry another who is ignorant of the incapacity.

§ 188. **Contract dependent on the existence of a particular thing.** A party may make a contract which is dependent on the continued existence of a particular thing. When the thing ceases to exist through no fault of either party, the performance is mutually excused. A contracted to rent a music hall to B for a series of concerts. Before the time of performance arrived, the building was destroyed by fire without the fault of either party. The court held that this agreement was dependent upon the continued existence of the music hall, and its destruction relieved him from liability. Again, in Howell

(5) E. B. & E. 765.

(6) 37 Amer. L. Rev. 226.

v. Coupland (7) A made a contract with B to buy of the latter 200 tons of potatoes to be grown on certain land belonging to B. B planted his land in potatoes, and, without his fault, a disease attacked the crop and B harvested only 29 tons. In an action against him for failure to deliver, it was held that this was not an agreement to deliver under all circumstances, but to deliver 200 tons of potatoes grown on certain land, and the parties must be assumed to have intended to base their contract on the ability to raise potatoes on this land. On the other hand in Anderson v. May (8), A contracted to purchase 590 bushels of beans of B to be raised by B. B planted a crop to supply this contract, but it was destroyed by an early and unusual frost. A sued B for not delivering the beans and was allowed to recover, the court holding that since the agreement did not specify the particular land on which the beans should be raised, it was still possible as far as the facts are shown, for the defendant to have raised beans to satisfy the contract on other land, so no case of impossibility is established. This case can be reconciled with the preceding one only on the theory that in the first case the contract could only be satisfied by raising potatoes on certain specified land, whereas in the latter case no such limitation was found, the only restriction being that B must raise the beans.

§ 189. **Acts of law.** Contracts may become impossible of performance by reason of some legislative act, executive order, or judicial decree. To proceed with a performance in the face of such prohibition would be illegal,

(7) L. R. 1 Q. B. D. 258.
(8) 50 Minn. 280.

and while the performance is still physically possible it is not legally so (9). In People v. Globe Ins. Co. (10), an insurance company employed A as agent for a period of five years. Before the period of performance had expired, the company was dissolved in an action by the attorney general of the state. The court held that, by analogy to a contract for personal service between individuals, the dissolution of the company was the same as a death and the parties would be presumed to have impliedly limited their liability in such cases and therefore no liability for the unexpired period arose in favor of A. The court intimated a different rule would apply where the dissolution was due to the misconduct of the corporation. There is no doubt that where a corporation voluntarily dissolves, it would be liable on all the unexpired contracts for personal service, unless such liability were expressly excepted (11).

An act may become impossible in law, not because the law prohibits the doing of a particular thing contracted for, but because it makes it impossible to do it in fact, Thus in the case of Commonwealth v. Overby (12), A was charged with the crime of counterfeiting in the state courts of Kentucky. B gave bond for A's appearance in court. Later A was arrested by the federal authorities on the same charge, convicted, and sent to prison for which reason B was unable to produce A in court as provided in the bond. B was held not liable, the arrest mak-

(9) Wald's Pollock, Contracts (Williston's ed.), 387, note.
(10) 91 N. Y. 174.
(11) Wald's Pollock, Contracts (Williston's ed.), 548.
(12) 80 Ky. 208.

ing it impossible to conform to the bond. On the other hand in the case of Taylor v. Taintor (13), A was bondsman for B who was charged with a crime in Connecticut. While at large on bail, B went to New York and was there arrested. On extradition he was taken to Maine, where he was convicted of a crime and sent to prison, for which reason A was unable to produce him in Connecticut. A was held liable on the bond on the ground that it was his fault that B was permitted to leave Connecticut, and secondly, since the laws of a foreign state are treated as facts, the retention of B by the state of Maine was not an act of law in Connecticut. Assuming that A was without fault, it would seem that as the proceedings by which B was removed were sanctioned by the laws of the United States, it might properly be assumed the parties intended this as an implied exception to the rule, and such was the view of the minority of the court. The rule that the law of a foreign country or state is treated as a fact is unquestioned, and for the purposes of this rule, the several states of the United States are regarded as foreign to each other (14).

§ 190. **Acts of war.** A contract may be rendered impossible by reason of war. The term "war" as used in this connection means armed conflict between organized governments; hence, mere insurrections, riots, and strikes, though attended by violence, will not excuse nonperformance of a contract (15).

§ 191. **Increased expense.** The fact that the expense

(13) 16 Wall. 366.

(14) Harriman, Contracts, Sec. 269, a.

(15) Summers v. Hibbard, 153 Ill. 102.

of a performance has been unexpectedly increased will ordinarily not excuse non-performance. Thus in Brown v. Royal Ins. Co. (16) the insurance company after a loss occurred elected to rebuild the premises insured, which had been partially destroyed by fire. As the ruins of the building were regarded as unsafe by the building commissioners, they ordered the building torn down. This greatly increased the expense of rebuilding, but the court held that it did not present a case of impossibility, but merely more expense in doing a possible act.

§ 192. **Alternative contracts.** Where a party has the alternative of doing one of two acts and the performance of one of these acts becomes impossible, the promisor will still be held liable to perform the possible act. Thus A leased mineral lands to B and B agreed to pay two pence a ton for ore raised, not less than 2,000 tons to be raised annually, or pay a fixed rent, at his option. Held, the fact that no minerals were found would not excuse non-performance of the contract, since it was still possible for the lessee to pay rent (17).

§ 193. **Impossibility occasioned by act of the party.** Where impossibility is occasioned by the act of the party, it amounts to a breach, and can not be set up as a defense. Thus where the subject-matter of the contract is destroyed or conveyed away, preventing performance, the promisor will not be relieved.

§ 194. **Rights of parties where contract can not be performed on account of impossibility.** The question is fre-

(16) 1 E. & E. 853.

(17) The Marquis of Bute v. Thompson, 13 M. & W. 487.

quently presented as to the rights of one who has partially performed under a contract which becomes impossible of performance without any fault on his part. In dealing with this question, it must be borne in mind that impossibility is a mere defense for non-performance. Thus if A fails to perform because of impossibility, he is excused from liability for non-performance, but it does not follow that he has any rights against the other party in consequence of acts already done. Thus if A agrees to build a house for B to be paid for on completion, B is not liable to pay for the house until it is completed. The fact that the building is destroyed by a fire or by a cyclone before completion would seem to impose no liability on B. He has not received any benefit under the agreement, and his contract provides that he is not to be liable until the house is delivered. If the house is to be completed by a particular time, and just prior to that date the building was destroyed, the question arises, can the promisor go ahead and erect another house and compel the other party to accept it? This would depend somewhat on the terms of agreement, and the conduct of the other party. Thus if it appears that the completion of the building by the date named was an absolute essential to B, it would seem that A could not go ahead and build another house, but if it was not an absolute essential and consequently did not go to the essence of the agreement, or if B waived the performance of the provision as to date, then A could go ahead and erect another building, and compel payment therefor. If no time is fixed for performance, a reasonable time will be presumed. What constitutes a reasonable time will depend on the circum-

stances of each case, and in determining it it would be proper to take into consideration the difficulties which the contractor has had to deal with through no fault of his own. The fact that the building was practically completed and then destroyed by a cyclone or fire may be taken into consideration in determining a reasonable time for performance. In case of contracts for personal services, the courts of the United States generally allow recovery for services actually performed prior to the impossibility. Recovery is not based on the express contract but on the implied contract (18). Where A is to perform services on the property of B, as in a contract by A to repair B's house, A is permitted to recover for services actually rendered up to the time of the destruction of the property, on the ground that since the property on which he is working is in the custody and control of the other party, he is presumed to assume the risk of its continued existence (19).

(18) Keener, Quasi-Contracts, p. 241.

(19) Butterfield v. Byron, 153 Mass. 517.

CHAPTER XIII.

MISTAKE.

§ 195. **Mutual mistake.** Where the parties to a contract are both laboring under a mistake as to the subject matter, or an essential term of the contract, the agreement is of no legal validity since no actual agreement with reference to a common object has been made. In Raffles v. Wichelhaus (1), A agreed to sell a cargo of cotton to B, to arrive by the ship Peerless from Bombay. It appeared that there were two ships of that name from Bombay, one sailing in October, and the other in November. A had in mind the cargo of the first ship, and B the cargo of the second ship. It was accordingly held that, since the minds of the parties had never met on a common subject matter, no contract was made. Mutual mistake as to the character or value of the thing sold will not avoid the contract, where it is clear that the parties agree as to the subject matter of the sale. In Wood v. Boynton (2), A sold a stone to B for one dollar. Both parties were ignorant of the nature of the stone. The stone was afterwards found to be a diamond worth $700. The contract was held binding, since it was clear that both parties intended this particular stone to be the subject matter of the sale. The contract was to sell this stone irrespective of its character.

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(1) 2 H. & C. 906.

(2) 64 Wis. 265.

§ 196. Mistake by one party. Where only one of the parties is laboring under a mistake, which was not induced by the other party, the contract is binding. In Smith v. Hughes (3) A contracted to sell oats to B. A tendered new oats which B refused to receive on the ground that he thought he was buying old oats. B was held liable on the ground that the contract did not call for old oats, so A's tender of new oats was good. If it had appeared, however, that A knew that B thought he was being promised old oats, the result would have been different.

§ 197. Mistake as to identity of a party. The above principle applies where one party is laboring under a mistake as to the identity of the other party to the contract. Thus if A contracts with B in the belief that B is another person of the same name with established credit, the contract will be binding unless B has by false representations induced that belief. This would certainly be true where the parties are dealing face to face. If the contract is by correspondence, there is some doubt, and the rule applied in the case of mistake as to subject matter might apply.

§ 198. Mistake known to the other party. Where a party knows or should have known that the other party is acting under a mistake, the law will not permit him to take advantage of it. In Hume v. United States (4) A agreed to furnish shucks to the United States for sixty cents a pound. It was customary to buy shucks by the

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(3) L. R. 6 Q. B. 597.

(4) 132 U. S. 406.

hundred weight, but in the blank furnished by the United States the word pounds was printed. Since shucks were not worth more than two cents a pound, the court held that A must have known that there was a clerical error, and that the United States did not intend to accept a bid at least thirty times the real value of the thing contracted for.

§ 199. **Mistake as to form.** It frequently happens that the parties have come to an agreement, but the instrument actually drawn up and signed fails to state the agreement. Thus, if the contract is for the purchase of land, the contract may fail to describe the land actually intended to be sold. In cases of this class, a court of equity will receive evidence of the agreement actually intended and direct that the writing be changed to conform to that intent. The same rule applies where the writing fails to use appropriate terms in describing the liability intended to be assumed. See the article on Equity in Volume VI of this work.

CHAPTER XIV.

IMPROPER CONDUCT INDUCING THE CONTRACT.

§ 200. Non-disclosure of facts. In general it may be said that parties negotiating for a contract are not bound to disclose all the facts which might materially affect the making or the terms of the contract. Thus, if A offers to buy B's farm for $25 per acre, the ordinary value of farm land, knowing that valuable minerals have been found on adjoining lands, and B accepts the offer, A is entitled to his bargain and is under no duty to disclose to B the mining possibilities of the land which greatly increase its selling value. The parties are said to be dealing at arm's length, and B has no right to complain since A has not misled him.

If, however, A stood in a confidential relationship to B, as for example A was B's agent, and in the course of his duties had discovered the mineral wealth of the land, he would be compelled to make a full disclosure of the facts, if the contract were to stand (1). The same rule is applied to all contracts where the essential facts are within the peculiar knowledge of one party, and his relation to the other party is such that good faith requires a full and frank statement. Contracts of insurance, and the allotment of shares in corporations by promoters are the usual class of agreements where this rule is applied (2).

(1) Dambmann v. Schulting, 75 N. Y. 55.

(2) Walden v. Louisiana Insurance Co., 12 La. 134.

§ 201. **Affirmative misrepresentations.** During the negotiations preliminary to the actual contract, many statements may be made relative to the subject matter of the contract for the purpose of inducing the other party to contract. If it turns out that some of these statements are untrue, to what extent is the contract affected?

It may be that the statement is an immaterial one, and the contract is not affected at all. Thus A is negotiating for the purchase of a horse from B. B states that the horse was once ridden by ex-President Roosevelt. This would obviously be an immaterial fact, unless it appears that A is only willing to buy a horse that has been so ridden. Again B may state that the horse is the best horse in the country. Such a statement is the mere expression of B's opinion, and even if false will not affect the contract, since it is obviously mere boasting by B about his property (3). If, however, B makes a statement of fact which is untrue, and which induces A to make the contract, A would be entitled to rescind the contract. If A were purchasing the horse for breeding purposes, and B stated that the horse was sired by X, a noted race-horse, which statement was untrue, A could refuse to carry out the contract. The fact that B thought the statement was true and made the statement in good faith will not affect A's right to repudiate the contract, although it may affect the relief open to A. B's statement that the horse was sired by X is a statement of fact which is untrue. It has induced A to buy the animal; his assent to the offer was not a real assent. Since he only intended to buy an

(3) Deming v. Darling, 148 Mass. 504.

animal sired by X, he can unquestionably rescind. The fact that B made the statement in good faith will relieve him of a charge of fraud, and A's only remedy is to rescind the contract or set up the falsity of B's statement as a defense when sued.

§ 202. **Distinction between effect of misrepresentation and of fraud.** If B had known that the statement was false, when he made it, or had acted recklessly without investigation, A could sue him for fraud, and recover damages or rescind at his pleasure. The practical distinction between a false material statement, knowingly made with intent to mislead A, and a false material statement innocently made with intent to induce A to buy, is in the remedy open to A. In the first case he has his remedy for fraud, or may rescind the contract (4). In the second case, he may rescind merely, or defend on the ground of the falsity of the statement if sued on the contract (5), but can not sue in deceit. In both cases the statement must be material, and the other party must act upon it. If A knows that B is not telling the truth, he cannot afterwards claim that he was misled by the statement. If A wishes to have a remedy against B under such circumstances, he must insist that B's statement be incorporated into the contract itself.

§ 203. **What is a false statement.** To constitute fraud there must either be a statement which is false or a statement not untrue in itself, but accompanied by such a suppression of facts as to convey a false impression. Thus in

(4) Hotchkin v. Bank, 127 N. Y. 329.

(5) Wilcox v. Iowa Wesleyan University, 32 Ia. 367.

Newell v. Randall (6) A, a merchant, applied to B, a wholesale dealer, for credit. B requested A to make a statement of his financial condition. A sent a statement showing the property owned by him, cash on hand, etc., but did not state that his outstanding obligations exceeded the amount of his property. The statement was true as far as it went, but the failure to state his liabilities amounted to a false statement. The representation must be one of fact. A mere opinion which is unfounded will not affect the contract. Thus, if A says certain property is worth $5,000, the other party must rely upon it at his peril. If, however, A states that he paid $5,000 for the property, which is untrue, we have a misstatement of a fact which may invalidate the contract (7).

§ 204. **Statements of law.** The rule is laid down broadly that a misrepresentation of law will not give rise to an action for fraud. It is said that everyone is presumed to know the law, and to permit ignorance of law to be set up would result in confusion and injustice. This does not seem convincing, and it has been suggested that the presumption that every one knows the law should be limited to general rules of law, and should not apply to private rights under the law (8). In general, however, the statement that the law is thus and so will be regarded as a mere statement of opinion, which, as we have seen, the other party relies upon at his peril (9). The rule may be limited by other circumstances. Thus if the parties

(6) 32 Minn. 171.
(7) Fairchild v. McMahon, 139 N. Y. 290.
(8) Cooper v. Phibbs, L. R. 2 H. L. 170.
(9) Fish v. Cleland, 33 Ill. 237.

stand in a confidential relationship to each other, and the one giving the information has superior means of knowing the truth, if the statement is false relief may be had (10). The statement of law may also be involved with misstatement of facts, in which case relief is given. See the article on Equity in Volume VI of this work.

§ 205. **Effect of fraud.** Where a person has been induced by fraud to make a contract, several alternatives are open to him. He can treat the contract as valid, and sue in tort for the fraud. He can rescind the contract by proceedings in equity, or he can wait until sued upon the contract and set the fraud up as a defence. The proper course to pursue will depend on the circumstances of each case. Since the contract is binding until set aside, rights of third persons may intervene that will limit the remedy. Thus, if A sells a horse to B, induced by B's fraud, and B sells the horse to C, who is ignorant of the fraud, A cannot recover it, since B has title and can convey it to C (11). The only remedy then would be an action for deceit against B.

If, on discovering the fraud, A does any act which indicates his intention to rely upon the contract, he cannot afterwards rescind, if the other party has changed his position in reliance on A's conduct (12).

§ 206. **Undue influence and duress: In general.** The principle on which relief is given in case of fraud is that the assent of the defrauded party is unreal because he was led to agree to the contract in the belief that certain

(10) Westervelt v. Demarest, 46 N. J. L. 37.
(11) Rowley v. Bigelow, 12 Pick. 307.
(12) Crooks v. Nippolt, 44 Minn. 239.

facts are true, when they are not. The same principle applies in cases of undue influence and duress. In fraud the mind of the promisor does not assent by reason of the false statement which he assumes to be true. In the case of undue influence, the mind of the promisor does not assent because his will is dominated by the will of the one exerting the influence. In form, the promise is that of the promisor; in reality, the promisor is a mere automaton registering the controlling will of the person exerting the influence. In the case of duress, the will of the promisor does not operate because of fear which the actual or threatened violence either to the promisor himself, or to his wife, parent or child may cause.

§ 207. **Undue influence: Special cases.** Cases of undue influence more commonly arise in connection with wills, where some member of the family succeeds in impressing his will on that of the enfeebled testator. The doctrine is not limited to this class of cases, however. A presumption of undue influence arises where the parties stand in unequal relation to each other, as where the creditor exacts excessive interest, or the debtor agrees not to redeem mortgaged premises. Some of these cases are controlled by statute. Again, where the relationship between the parties is one of dependency, as parent and child, trustee and beneficiary, etc., transactions between parties in these classes are prima facie unfair and will not be allowed to stand except on a clear showing as to fairness and frankness in the transaction (13).

§ 208. **Effect of undue influence and duress.** Agree-

(13) Ross v. Conway, 92 Cal. 632.

ments obtained as the result of undue influence or duress are not void. The same rules as to relief that apply in the case of fraud are applicable here also (14). The effect of such conduct in equity is discussed in the article on Equity Jurisdiction in Volume VI of this work.

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(14) Jenkins v. Pye, 12 Pet. (U. S.) 241.

QUASI-CONTRACTS.

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CHAPTER I.

THE NATURE OF QUASI-CONTRACTUAL OBLIGATIONS.

§ 1. **Historical connection of quasi-contract with forms of pleading.** Fully to explain the subject of this chapter it will be necessary first briefly to review some of the fundamental principles of the common law system of pleading. See also the article on Common Law Pleading in Volume XI of this work. Under that system a plaintiff, in stating his case to the court and to his opponent, had to use the appropriate form of action. That is to say, all legal wrongs were for the purposes of pleading divided into a number of distinct classes, and in each class there was an appropriate form of stating the case

to the court which the plaintiff was obliged to use. Some of these forms were developed at a much later period than others and one of the last to be developed was the action of assumpsit, which received its name from the Latin words in the declaration, "super se assumpsit," meaning he undertook or promised. This action of assumpsit was subdivided into two classes, special and general. It is with the latter action that we have chiefly to deal in connection with the subject of quasi-contracts.

The term "quasi-contract" translated into plain English, means "as if a contract"—something like a contract, and yet not one. Only by a consideration of the form of pleading can a clear understanding be had of why the obligation we have to deal with here received the name of "quasi-contract." The action of special assumpsit was the form of action for the enforcement of simple contracts, that is, legally enforceable promises which were not under seal. Before the development of general assumpsit, there was a form of action known as "debt" which lay for the enforcement of any duty to pay a sum of money which was definite and certain. There were connected with the action of debt certain procedural disadvantages which made it desirable to extend, so far as possible, the action of assumpsit to cover the cases to which debt applied; and this was done by holding, first, that if a man had a debt and a subsequent express promise to pay the same, the promise was legally enforceable—the debt was the consideration of the promise, it was said. The form of declaration alleged the existence of the debt and the facts giving rise to it in general terms, only. At

first, an express promise to pay the debt, made subsequently to the origin of the debt, had to be proved in order that assumpsit might be brought. After a time, however, it was argued that the law would imply a promise to pay the debt, and that no express promise need be proved. In other words, the debt was all that had to be proved, and the promise alleged in the declaration in this form of assumpsit was implied by the law. At this stage, however, the action of assumpsit in this form was still only a new remedy for old rights—a new way of enforcing rights already recognized. The sum sought to be recovered had to be one which could have been recovered in the old action of debt.

§ 2. **Its extension by Lord Mansfield.** It remained for Lord Mansfield, borrowing to a large extent from the Roman law, to extend the action to cover a whole new field, and thus to create a new branch of the law—a new set of rights under a pretense of simply determining whether the plaintiff could use a new form of action. In 1760, in the celebrated case of Moses v. Macferlan (1), Lord Mansfield said: "The first objection is that the action of debt would not lie here and no assumpsit could lie where an action of debt might not be brought. . . . But there is no foundation for it. . . . If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies the debt, and gives this action, founded on the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu' as the Roman law expresses it)." In other words, says Lord

(1) 2 Burr. 1005.

Mansfield, not only may the action be used for the previously recognized cases, but wherever, according to natural justice and natural equity, a person ought to pay a sum of money to another person, the law imposes a duty upon him to do so; and in addition, in order to compel the performance of the duty, the law implies a fictitious promise to do so, so that the action of assumpsit may be brought for the breach of the fictitious or implied promise.

It is with these obligations to pay money, arising, not because the plaintiff has received the defendant's promise to pay, but because, on certain principles of justice and equity, the court decides the defendant ought to do so, that we have to do in this portion of this work. These obligations in the common law system of pleading were enforced as if they were contracts, by an action of assumpsit, and were called, by the older generation of lawyers, and to a large extent are still called, "contracts implied in law," meaning that the promise to pay is implied, or better, constructed, by the court from the facts of the case, and does not, in fact, exist.

§ 3. Quasi-contracts distinguished from true contracts. The fundamental distinction, then, between a true contract and a quasi-contract, lies in the fact that in the latter case, the defendant is bound to pay because, in the eyes of the court, he ought to do so, according to the principles of natural justice and equity as seen by the court, while in the former he is bound to do so because he has agreed to do so. At this point we must guard ourselves against confusing two things, which have often been carelessly mistaken for each other. In all

the older books upon contracts and pleading, one will find contracts divided, first, into two main classes: (1) express; and, (2) implied, and the latter class subdivided into two sub-classes, (a) contracts implied in fact and (b) contracts implied in law. As we have already seen, this latter class are not true contracts, but are quasi-contracts. What are the second class—contracts implied in fact? A concrete illustration will do more perhaps to answer this question than any general definition. Suppose I go into my grocer's and simply say, "Send up a bushel of potatoes," and walk out, and the grocer sends them. Here I have actually promised to pay the price of a bushel of potatoes, not by word of mouth, but by my acts; and acts, in this case, speak at least as loudly as words. I have in fact made a promise; that is, the grocer, as a reasonable man, is justified in inferring that that is what I mean. I am therefore, in such a case bound to pay the grocer because I have in fact agreed to do so; that is, I am bound by the contract. The express contract, therefore, is a legally enforceable promise made in words; a contract implied in fact is also a legally enforceable promise, expressed, however, by acts, but none the less a true promise. The "contract implied in law," as we have seen, is based not upon an actual promise made by one person to another, but upon a fictitious or constructive promise which for the purpose of pleading, the law implies in order to permit the action of assumpsit to be used, to enforce the duty to pay which the law imposes upon the defendant. It seems better therefore to drop out from

the subject of contracts altogether these so-called "contracts implied in law," and to give them a separate name which indicates that while they are not contracts but obligations imposed by law, they are enforced as though they were contracts.

§ 4. **Definition of quasi-contract.** In the quotation from Lord Mansfield given above, it will be noticed that he used in reference to these obligations the Roman law term "quasi ex contractu," (as if from a contract). It is by adopting the suggestion therein contained that modern authors have come to use the term "quasi-contract." Many objections have been made to this name for reasons which cannot be given here, but it is now generally accepted, especially by recent writers, and will be used in this article. Some writers have suggested as a better name, the phrase "constructive contracts," on the ground that the promise for the breach of which the plaintiff sues, is in reality constructed by the court from the facts which show that the defendant ought to pay the sum to the plaintiff, but this suggestion has not, to any extent, been acted upon.

For the purposes of this work, then, we may describe, if not define, quasi-contracts as including all duties to pay money to others which arise, not because of an agreement to do so, but because the law imposes the duty upon the defendant. The aim of our discussion, therefore, must be to determine the cases in which, and the principles upon which, our system of law imposes upon persons these duties to pay money to other persons.

§ 5. **A record gives rise to a quasi-contract.** One of

the earliest examples of what is properly called a quasi-contractual duty arises when a judgment is rendered by a court of common law against the defendant in an action. The entry of the judgment determines that there is a legal duty on the part of the defendant to pay the plaintiff a sum of money, the amount of the judgment. This is true, irrespective of the nature of the action for which the judgment is recovered; that is, whether the action be one for damages for a breach of an actual contract, or for damages arising from a tort of any kind. This duty arises, therefore, not because the defendant has promised the plaintiff in any way to pay the sum, but simply because the court has determined that he ought to do so. An obligation of this kind clearly answers our description of a quasi-contract, and is so classified. Formerly, in accordance with the classification given above, it was described as a contract implied in law, or more specifically, a "contract of record."

§ 6. **A statutory duty may give rise to a quasi-contract.** It sometimes happens that a statute passed by a legislative body imposes a duty upon one man to pay a sum of money to another man, although he has not agreed to do so. In such a case the resulting duty must, according to our description of quasi-contracts, be classed as a quasi-contract. For example, it is not unusual for statutes to require the master of a vessel to accept the services of the first pilot who offers his services, and to provide that, in case the master refuses the services of the pilot who so offers himself, he shall pay the pilot for his services as if they had been rendered. In a case

of this kind, therefore, the action of the pilot against the master to recover for the services which were not rendered but only tendered is based upon a quasi-contract (2).

§ 7. **An official duty may give rise to a quasi-contract.** In certain cases a public officer in the discharge of his duty is bound by the law to pay over a sum of money to another person, and here again we have a duty to pay money imposed by law, that is, a quasi-contractual obligation. For example, in the case of King v. Moore (3), the defendant King was a sheriff who had levied upon and sold property of one Lewis under an execution. After paying the amount of the judgment to the judgment creditors out of the proceeds, he had left a balance. It was held that he was under an official duty to pay this balance over to the judgment debtor, the quasi-contractual duty arising from his official position.

§ 8. **Unjust enrichment the basis of most quasi-contracts.** The most important and by far the largest class of cases which fall under our subject are those in which the duty to pay is based upon Lord Mansfield's famous principle that wherever, according to the principles of natural justice and equity (ex aequo et bono) the defendant ought to pay, the law imposes a duty to pay. This principle is stated by Professor Keener, the first writer who published a treatise on this subject, as follows: "No one shall be allowed to enrich himself unjustly at the expense of another." Obviously the state-

(2) The Francisco Garguilo, 14 Fed. 495.

(3) 6 Ala. 160.

ment of such a very general and abstract principle does not take us very far, and we must therefore proceed to discover from the cases decided by the courts what has been held to be and what has been held not to be an unjust enrichment of one man at the expense of another. In doing so we shall discover certain limitations upon the principle which really allow one to enrich himself unjustly at another's expense in certain ways, the court refusing the plaintiff relief, in spite of the unjust enrichment, because of some real or fancied demand of public policy, or for some other reasons which will be set forth later. Let us then proceed to the application of the general principle as we find it in the cases.

CHAPTER II.

WAIVER OF TORT.

§ 9. **Meaning of "waiving the tort."** We can best approach the discussion of the branch of the subject which will be dealt with in this chapter by considering a concrete case. Suppose B takes A's horse without A's permission, and carries him off and sells him. B is said to have converted A's horse, that is, to have committed the tort or wrong known as a conversion. A may therefore sue B in the appropriate common-law form of action for the redress of such a wrong, namely, the action of trover. The wrong, from the point of view of the tort action, consists in the unlawful assumption of dominion by B over A's chattel, and the amount of A's recovery is the damage which has been inflicted upon him by this wrongful act of B. Upon examining the transaction, however, we discover that in addition to the tort, that is in addition to the loss inflicted on A by B's wrongful act, we can discover a different relationship in the case supposed; that is to say, we may look at it from a different point of view. Not only has B inflicted a loss upon A, but B has enriched himself by the amount he has received from the sale of A's horse. This enrichment certainly is an unjust one. If then, our principle that no man shall unjustly enrich himself at another's expense

be of universal applicability, we have here the basis for a quasi-contractual obligation, that is, a duty imposed upon B to pay A a sum of money equal in amount to the enrichment which he has unjustly received at A's expense. We shall expect therefore, in accordance with the view expressed by Lord Mansfield in the case of Moses v. Macferlan, above referred to (1), that A could maintain an action of general assumpsit against B, and such is the law. The form of the declaration in such a case, at common law, would allege that the defendant B was indebted to the plaintiff A in the sum of $..... (stating the amount received by the defendant for the horse) theretofore had and received by the defendant to the use of the plaintiff, and being so indebted, the defendant promised to pay the said sum to the plaintiff on request, and that he has not done so. This form of the declaration in general assumpsit is known as the count for money had and received, and is perhaps the form used more than any other for the enforcement of quasi-contractual obligations. When the plaintiff brings an action of assumpsit, in cases of this kind, instead of suing in trover for the conversion, he is said to "waive the tort and sue in assumpsit." This phrase, however, is not strictly accurate, for as a matter of fact the plaintiff simply chooses to look at the transaction from the point of view of the unjust enrichment, instead of from the point of view of the loss inflicted upon him by the defendant's act. In other words, the plaintiff has his election to adopt either point of view, and therefore to

(1) § 2, above.

elect between two different remedies. It may with equal truth be said, when the plaintiff in such a case sues in trover, that he waives the assumpsit and sues in tort for the conversion.

§ 10. **Conversion and sale. Measure of recovery is amount received.** Let us now examine our case a little more closely. Suppose the horse so taken by B was worth in the market $100, but that B, being a sharp bargainer, received for him more than that, say $150. In a suit by A against B, in trover for the conversion of the horse, the measure of damages would be the market value, $100. Suppose now instead of suing in trover, A waives the tort and sues in assumpsit for money had and received. How much will he recover? According to the decisions of the courts, he will be entitled to recover the amount which B received, be it more or less than the market value of the horse. That is to say, in the case supposed, he will recover $150. What is the principle back of this? The real question involved is, what is the amount of the unjust enrichment which B has obtained at the expense of A? Is it $100, or 150? The view which the courts have taken is this: The $150 is the substitute for the horse and it would not be just to allow the defendant to take the plaintiff's property, sell it, and retain any of the proceeds of the same. They accordingly hold that the measure of damage in the assumpsit action is the amount actually received for the plaintiff's property by the defendant. This rule, it will be noticed, works both ways. For example, if the defendant received only $75 for the horse, although he was worth $100, and the

plaintiff were to bring an action for money had and received, all that he could recover would be $75.

§ 11. **The quasi-contract arises when the money is received. Statute of limitations.** The action then in this class of cases is brought upon the theory that the money received by the defendant is received in exchange for the plaintiff's property and in equity should be paid to the plaintiff. It follows from this that the right to bring an action for money had and received does not accrue to the plaintiff until the defendant has sold the property and received the money for it, the wrongful act for which the action of assumpsit is brought in this case being the failure of defendant to pay to the plaintiff the money thus received. This fact has an important bearing upon the running of the statute of limitations. For example, if we suppose that the sale by the defendant and the receipt of the money does not take place until two or three years after the original conversion, the action for money had and received does not accrue until the receipt of the money. According to the general principles covering the application of the statute of limitations, the time for the running of the statute is computed from the date upon which the plaintiff's right of action accrued, which in the case supposed, is two or three years after the conversion. The result is that very frequently the action in tort for the conversion will be barred by the statute of limitations, while the action for money had and received, not having accrued until much later, will not be barred for a much longer period.

Suppose now that the defendant B appropriated the

property of A, the plaintiff, and retained the same for so long a period that A, because of the running of the statute of limitations, lost all right to recover the property from the defendant in an action of replevin or some similar action. Suppose further that after this the defendant sells the property in question and receives money for the same. Could A maintain an action for money had and received under those circumstances? The answer to this depends on whether A, the plaintiff, after the statute had barred his action of replevin, still retained any title to the property; because, if the effect of the running of the statute and the consequent barring of the replevin action is to vest the title to the property in the defendant, it would follow that when the defendant later sold the property he was selling his own property, and the money received would be the price, not of the plaintiff's property, but of the defendant's property, and so no action for money had and received would lie. This is the view which the courts have taken of this question. They hold that the effect of the statute of limitations when it bars all actions for the recovery of specific property, is to vest the title to that property in the defendant, and that therefore a sale later is simply a sale by the defendant of his own property, and gives rise to no quasi-contractual obligation.

§ 12. **Money or its equivalent must be received.** If the defendant appropriates the plaintiff's property and exchanges the same for other property, clearly the defendant has not received money for the use of the plaintiff, and so a count for money had and received will not

be supported. As there never was developed any form of declaration in assumpsit to cover the receipt of anything to the use of the plaintiff except money, it follows that no quasi-contractual action can be maintained in such a case, although of course there is an unjust enrichment at the expense of the plaintiff, as much as in the case where money is received instead of property. The reader, however, is referred upon this point to the article upon Trusts in Volume VI of this work, in which he will learn that in such a case the plaintiff could by a bill in equity hold the defendant as a constructive trustee of the new property received in exchange for the old, and would therefore be entitled to a decree from the court of equity, directing the defendant to transfer to the plaintiff this new property; a result reached by the court of equity upon exactly the same principles as those upon which the court of law has proceeded in the case which we have just been discussing. It should be noted also that if the defendant was entitled to receive money in exchange for the plaintiff's property, and in place of that, accepted property, the property so received is held to be the equivalent of money, and the plaintiff is accordingly entitled to bring an action for money had and received. For example, in Miller v. Miller (2) the defendant bought certain wood belonging to the plaintiff and sold the same under a contract entitling him to receive money, but finally took in part payment for the same some real estate which he still held. It was decided that an action for money had and received for the

(2) 7 Pick. (Mass.) 133.

whole promised price would lie, on the ground that he had received the equivalent of money. Had, however, the transaction been that the defendant exchanged the wood directly for real estate, never being entitled to money, a count for money had and received could not have been sustained.

§ 13. **Conversion and no sale: May tort be waived?** Returning now to the case in which B appropriated A's horse, let us modify the case by supposing that B instead of selling the horse kept him for his own use. This of course is equally a conversion. May A, the owner of the horse, in a case of this kind, waive the tort and sue in assumpsit, or is his sole remedy the tort action for damages? Before we can answer this question, we must examine the forms of declaration in general assumpsit, and see if there be any form which could cover the case. On doing so, we find only one that could by any possibility apply, namely, the count for "goods sold and delivered." In this form of the declaration the allegations would be that the defendant was indebted to plaintiff for one horse theretofore sold and delivered by plaintiff to the defendant, and being so indebted the defendant promised to pay the said sum to the plaintiff on request, and that he had not done so. Remembering now that the declaration in general assumpsit is not to be taken at its face value, but that the promise alleged in any event is a fiction, does this form of declaration mean that an actual sale was made? Let us go back a moment to the case of the action for money had and received, if B had sold the horse. The declaration there

says that there was money had and received by the defendant to the use of the plaintiff. Now the evidence would show that the defendant received the money actually for his own use. That is, that was his intention, and the assertion that it was to the use of the plaintiff is the result of a rule that the law makes it his duty to pay it to the plaintiff. May not the law say, in the case where he keeps a horse instead of selling it, that the owner may treat it as a fictitious sale and compel him by an action of assumpsit for one horse sold and delivered to pay the value of the horse, as though there had been a sale? Or, putting it shortly, may he not be sued on a constructive or fictitious sale?

§ 14. **Same: Illustrations.** Upon this question the authorities are unfortunately divided. In the English case of Russell v. Bell (3) the court allowed an action of this kind, Lord Abinger saying in the course of his opinion: "If a stranger takes my goods no doubt a contract may be implied and I may bring an action, either of trover for them, or of assumpsit. This is a declaration framed on a contract implied by law. Where a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit." In the early Massachusetts case of Jones v. Hoar (4) the court refused to allow the action, saying: "The whole extent of the doctrine, as gathered from the books, seems to be that one whose goods have been taken from him or detained unlawfully, whereby he has a right to

(3) 10 M. & W. 340.

(4) 5 Pick. (Mass.) 285.

an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds." So in the case of Watson v. Stever (5) the same conclusion is reached, the court, speaking through Mr. Justice Cooley, saying: "If one has taken possession of property and sold or disposed of it, and receive money or money's worth therefor, the owner is not compellable to treat him as a wrongdoer, but may affirm the sale, as made on his behalf, and demand in this form of action the benefits of the transaction. But we cannot safely say the law will go very much further than this in implying a promise, where the circumstances repel all implications of a promise in fact."

§ 15. **Same: Conclusion.** It is apparent that in both of these cases the court misconceived the basis of the action for money had and received where the defendant has sold the converted goods. Apparently it is thought that in some way a promise in fact can be found; that by choosing to waive the tort and sue in assumpsit the plaintiff has in some mysterious way affirmed the sale so that it was in fact made with his consent from the beginning as though the defendant had been his agent. It is however well recognized today that such is not the case, but, as we have seen, that the principle involved is that the money received is an unjust enrichment of the defendant at the expense of the plaintiff. In both the case where the property is sold for money, and in the

(5) 25 Mich. 386.

case where it is retained by the tort-feasor, the circumstances repel all implications of a promise in fact and in both cases it is true that the defendant has unjustly enriched himself at the expense of the plaintiff. In many, and perhaps a majority, of the American states which have passed upon the question, the action for goods sold and delivered in the cases with which we are dealing, is allowed. For example, in Walker v. Duncan (6) the plaintiff alleged a sale and delivery by the plaintiff to the defendant of 250,000 feet of lumber, and that the defendants had not paid for the same. At the trial, all the plaintiff proved was that the defendants had wrongfully appropriated logs belonging to the plaintiff. The court held that the plaintiff had proved the allegations of his complaint, and that under the circumstances of the case the plaintiff had the right to waive the tort and sue in assumpsit on the "contract implied by law," if he so wished.

§ 16. **Recovery in quasi-contract for use of personal property.** In the cases thus far considered of the appropriation of property, we have assumed that the defendant appropriated the entire property. Suppose now that instead of doing this the defendant simply appropriated the use of the property for a certain limited period. For example, in the case of Fanson v. Linsley (7) it appeared that the defendant had, without the permission of the plaintiff, taken a steam threshing machine owned by the plaintiff and used the same for a period

(6) 68 Wis. 624.

(7) 20 Kan. 235.

of three days. In doing so he had injured the machine so that the plaintiff expended $15 in having it repaired. In addition the plaintiff expended $12 in bringing the machine back to the plaintiff's farm, the defendant not having returned the same when he was through with it. It was found that the reasonable value of the use of the machine was $15 per day or $45 for the three days. The question in the case was, for which, if any, of these three items could a quasi-contractual action be maintained. The court, following a dictum of Lord Mansfield in an earlier case, held that the value of the use of the machine could be recovered on the basis of quasi-contractual obligation, but not the other two items. The reason for this is obvious. The injury to the machine, although it caused a loss to the plaintiff, did not result in an enrichment of the defendant. So also the expenditure by the plaintiff of the sum for having the machine returned to his farm was a loss to the plaintiff, but again not an enrichment to the defendant. The only enrichment was for the use of the machine for the three days, and this therefore was the limit of the plaintiff's recovery in that form of action.

§ 17. **Same: Illustrations.** In McSorley v. Faulkner (8) the plaintiff sold his business to the defendant and vacated the office in which he had been carrying on the same, the defendant taking possession of the office and carrying on the business. The telephone which the plaintiff had agreed with the telephone company to pay for for one year was left in the office. Nothing was said

(8) 18 N. Y. Supp. 460.

between the plaintiff and the defendant when the business was sold about the telephone, and the court found that it was not the fair understanding of the parties that the use of the telephone was transferred by the plaintiff to the defendant. Without the permission of the plaintiff the defendant used the telephone regularly and continuously for a certain period. Upon discovering this the plaintiff, who had had to pay the telephone company the agreed rental of the telephone, brought an action to recover from the defendant the reasonable value of the use of the telephone during the period in question. It was held that the plaintiff could recover, and that the reasonable value was the amount which the plaintiff had had to pay the telephone company for the period in question. Upon the same principle it is held that, where a person without agreeing to pay for the same, succeeds in getting his goods carried from one place to another by a common carrier without paying for the same, he is under a quasi-contractual duty to pay for the carriage. Similarly, one who infringes a patent and manufactures and sells the patented article must, where it is possible to estimate them, account to the owner for the profits of the infringement.

§ 18. **Recovery for use of real property.** In the case of real property where the defendant has used and occupied another person's land wrongfully and without permission, no quasi-contractual action can be maintained, for reasons connected with the historical development of this action of general assumpsit. The count in general assumpsit for the use and occupation of real estate, in

other words, can be sustained only in a case where the defendant has occupied the lands under an actual agreement, express or implied in fact, to pay for the same. Interesting questions arise, however, where the defendant has not been in the occupation of real property but has used it to a certain extent without taking possession of it. For example, in the case of Phillips v. Homfray (9) the defendants used, without the owner's knowledge, certain roads and passages under the plaintiff's farm for the convenience of their stone and iron. By doing this, it was admitted that they saved a considerable expense to themselves. The question before the court was whether the defendants were under a quasi-contractual duty to pay the plaintiff for the use of the underground roads and passages. As the action is not one for the use and occupation of real estate, the difficulty referred to above does not prevent a recovery, but the English court held, one of the judges dissenting, that no quasi-contractual action would lie, on the ground that "although the defendant saved his estate expense, he did not bring into it any additional property or value belonging to another person," and that the principle of unjust enrichment demanded the existence of both a loss to the plaintiff and an enrichment of the defendant. It is difficult to see, however, either that the defendant received nothing or that the plaintiff lost nothing. As already stated, one of the judges dissented from the conclusion reached, and it would seem that he had the better reasoning upon his side. The defendant had certainly used the plaintiff's property;

(9) L. R. 24 Ch. Div. 439.

he took, so to speak, a right of way under the plaintiff's land, and therefore had been enriched to that extent at the expense of the plaintiff. In certain American courts it has been held without any difficulty that the defendant who pastures his cattle upon land belonging to and in the possession of the plaintiff, is subject to a quasi-contractual duty to pay the owner of the land the reasonable value of the pasturage.

§ 19. **Same: Measure of recovery.** It has been suggested that in these cases of the wrongful use of property the amount which the plaintiff can recover is limited to the reasonable value of the use and does not cover the value of the use to the defendant. In other words, it is said that the plaintiff is not entitled to recover the profit which the defendant derived from the use of the plaintiff's property, but simply the reasonable value or the market value of the use. It seems however that this cannot be the law. Let us suppose in the case of the threshing machine previously discussed, that the defendant, instead of using the machine, had succeeded in renting it at an unusually high rate for the three days to another person. For example, suppose the reasonable or ordinary rental would be $15 per day, but that the defendant had found some one who had urgent need of the threshing machine and had obtained $25 per day for the machine. Would not the $25 that the defendant received for the sale of the use of the plaintiff's property be money had and received by the defendant to the use of the plaintiff? If we are to be consistent with the decisions in cases where the defendant sells the whole of the

property for more than it is worth, it would seem that here also the plaintiff is entitled to recover all that the defendant has received for the sale of the use of the plaintiff's property.

§ 20. **Recovery of fees or salary of public office.** Interesting questions arise in cases relating to public office. It happens not infrequently that the election officials issue a certificate of election to one person who assumes the office, enters upon his duties, and discharges the same for a certain period, and that in the meantime his opponent, who claims to have been elected, is contesting the election in the courts and is finally seated. Suppose now that the person who has been in the possession of the office, let us say, for six months, has performed all of the services for that time, and has collected the salary for that six months. At the end of that time his opponent obtains a judgment in the courts ousting his rival and seating himself. Is the one who has performed all of the services of the office entitled to retain the salary which he collected, or is the one who has successfully asserted his rights to the office entitled to demand the same? Before we can determine this, we must examine the principles of law governing the rights of a public officer to his salary. When we do so we discover that very different principles come into operation from those which obtain in ordinary life in the relation between an employer and an employee. Our law views the salary as an incident to the office, and not as payment for the performance of the services. For example, it has been held in a number of cases that where a public officer is

illegally prevented by his superior officer from performing the duties of the office, he is entitled to the salary for the period in question, although he has performed absolutely no services, and it is also held (contrary to the rule which would obtain between employer and employee in a similar case) that any money which the public official has earned in the meantime elsewhere is not to be deducted from the amount of his salary. In other words, the one who has the title to the office, it is held, has the right to the salary. In our case therefore, the case seems to be this: The one who was in office and performed the services did not have the title to the office. The fact that he performed the services, therefore, does not entitle him to the salary. The one who was out of office had the title to the office and therefore the right to the salary. The conclusion reached, then, is that the money received by the one who performed the service, of right should be paid to the one who had the title to the office, and it is accordingly held that the rightful claimant to the office is entitled to recover from the other party the salary received. See Public Officers, Chapter VI, in Volume IX of this work.

§ 21. **Recovery for services illegally obtained.** In Patterson v. Prior (10) the plaintiff was convicted and sent to jail by a court which had no jurisdiction, so that his imprisonment was unlawful, and he was subsequently released on a writ of habeas corpus. The defendant Patterson was lessee of the penitentiary and received all the benefit of the work and labor which the plaintiff

(10) 18 Ind. 440.

was obliged to do. The defendant Miller was the warden of the prison and, it was assumed by the court, was liable to the plaintiff in a tort action for false imprisonment. The plaintiff, after his release, brought an action to recover from Patterson and Miller the value of his services thus rendered under compulsion. The court held that the defendant Patterson was liable; that as to him the plaintiff could waive the tort and recover for work, labor and services performed on an "implied assumpsit;" that is, that the law imposed the duty upon the defendant Patterson to pay the plaintiff the value of the services which he had received from plaintiff and had not paid for. As to the defendant Miller, however, the court held the action would not lie, since he had received nothing, and there was therefore no unjust enrichment. In a similar case which arose in Michigan (11), however, the opposite result was reached by the court, the same mistake being made again as to the character of the action that was made in the case of Watson v. Stever, cited in §14 above. In fact the court relied on that case as its authority. The authorities on this particular point are not numerous, and apparently are about evenly divided. The sound view, however, seems to be that represented by the Indiana decision. It would seem to be immaterial that the defendant Patterson, for example, in the Indiana case, had already paid the state for the services of the supposed convict, inasmuch as the state was not entitled to the services of the plaintiff.

§ 22. Recovery for services of apprentice enticed away.

(11) Thompson v. Bronk, 126 Mich. 455.

In the case of Lightley v. Clouston (12) it appeared that the defendant had induced the apprentice of the plaintiff to leave the plaintiff and perform work and labor for the defendant. It was clear that a tort action on the case for damages could have been brought by the plaintiff against the defendant for his wrongful act in inducing the apprentice to leave the plaintiff. The plaintiff however brought an action of assumpsit to recover the value of the work and labor performed by the apprentice for the defendant, on the theory that the plaintiff was entitled to the services of the apprentice during the period in question. Lord Mansfield, following his general principles, held that the plaintiff might waive his action to recover damages for the tort and bring assumpsit to recover the value of the work and labor of the apprentice.

§ 23. **Recovery for benefits conferred under invalid marriage.** In the case of Asher v. Wallis (13) the defendant being a married man, represented that he was unmarried, and went through the marriage ceremony with a rich woman, the plaintiff in the case. She, supposing that he was her husband, allowed him to exercise the usual property rights that the husband was entitled to under the English law, and he accordingly leased her lands and collected the rents of the same for a number of years. She then discovered the fraud which had been practiced upon her and brought an action of assumpsit for money had and received to her use, claiming to recover in the

(12) 1 Taunt. 112.
(13) 11 Mod. 146.

action the amount of the rent which he had thus received. The court held that the action was well brought and that the quasi-contractual obligation existed under the circumstances of the case. In another case (14) in which the plaintiff had lived with the defendant under the honest belief that she was his wife, when in truth he had a former wife living, the action was brought to recover for the value of her services as housekeeper during the period of cohabitation. The Missouri court, in an elaborate opinion, held that the plaintiff was entitled to recover. However, other courts on a similar state of facts have denied a recovery (15). It would seem that the Missouri court had the better of the argument, it being difficult to distinguish between the case of the collection of rents and profits of real estate and the performance of services.

§ 24. **Right to recover benefits conferred under sale rescinded for fraud.** In the case of Roth v. Palmer (16) the defendant, by false or fraudulent representations, induced the plaintiff to sell certain goods to him under a contract to give a certain period of credit to the defendant. The plaintiff having discovered the fraud, without waiting for the expiration of the credit, brought an action for goods sold and delivered. The defendant claimed that the plaintiff was not entitled to bring an action of assumpsit until the time for payment had arrived. To decide the case it is necessary for us to ex-

(14) Higgins v. Breene, 9 Mo. 497.

(15) Swires v. Parsons, 5 Watts & Serg. (Pa.) 357.

(16) 27 Barb. (N. Y.) 652.

amine, somewhat carefully, the rights of the defrauded seller in a case of this kind. Apparently they are as follows: On discovering the fraud he may, if he so wishes, elect to affirm the contract and in that case he would be bound by all its terms, and so of course could not bring an action for breach of that contract until the credit had expired, and the defendant had failed to perform according to the terms of the agreement. But the law permits the defrauded seller to elect, if he wishes, to treat the agreement as a nullity, on learning of the fraud. If he adopts this course, the result is that he may at once bring an action in trover against the fraudulent buyer for a conversion of the property. The question with which we are concerned, then, is (if the case arises in a state which permits, in the case of ordinary conversion of chattels, the plaintiff to waive the tort and sue in assumpsit for goods sold and delivered) whether the defrauded seller who has chosen to treat the contract as a nullity, may waive the tort action and bring the assumpsit action for goods sold and delivered. The New York court, in the case cited, held that he was entitled to do so, and the conclusion reached seems correct. There is, however, an English case which takes the other view (17). The latter decision seems to be based upon an erroneous assumption that the bringing of an action of assumpsit for goods sold and delivered necessarily meant that the defrauded seller had chosen to affirm the contract instead of disaffirming it, but the New York court, in the case cited, shows that this is not true. In a juris-

(17) Ferguson v. Carrington, 9 B. & C. 59.

diction which agrees with the Massachusetts view, laid down in the case of Jones v. Hoar in § 14 above (that the plaintiff cannot waive the tort and sue in assumpsit for goods sold and delivered) the decision in the English case is, of course, correct.

§ 25. **Election of remedies.** From our discussion thus far it appears that in many cases a plaintiff has a choice between different remedies. The interesting question arises, then, when has he conclusively elected one in preference to the other? For example, suppose that the plaintiff has his choice to sue in trover for the conversion of the given article, or to waive the tort and sue in assumpsit for the value of the same. Suppose further that he has begun the action in assumpsit and for some reason has discontinued the same without prosecuting it to judgment. May he thereafter prosecute the tort action for the wrong in question? Upon this point the authorities are divided, the conflict having arisen from the failure of certain courts to appreciate clearly the basis of the assumpsit action in cases of this kind. For example, in the case of Terry v. Munger (18) the court held that by bringing an action of assumpsit the plaintiff had elected to treat the transaction as a sale, that therefore the title to the property would pass to the wrongdoer, and that the case must be treated for all purposes as if the title had passed at the time of the wrongful act. According to this view, therefore, an attempt to bring a trover action for the conversion later would be for the plaintiff to adopt a position inconsistent with the one he had occu-

(18) 121 N. Y. 161.

pied in the previous assumpsit case. This view, however, is contrary to the decision in the case of Huffman v. Hughlett (19) in which the opposite conclusion is reached. The view of the New York court seems on principle to be unsound. If we recall that the declaration in general assumpsit is not to be taken at its face value, and that the supposed sale and supposed promise are fictitious and not real, it seems clear that the bringing of the action of assumpsit for goods sold and delivered, where the plaintiff is waiving the tort, is not the assertion of an actual sale, but is really an assertion of a wrongful act of the defendant and the unjust enrichment growing out of it. There is therefore nothing inconsistent in the plaintiff later bringing the tort action and insisting upon the conversion. It is, however, clear that if the plaintiff brings one of these actions against the defendant and recovers a judgment for the same, he is precluded thereafter from bringing any other action against the defendant on account of the same transaction. This is not because he is held to have conclusively elected between the actions, but because of the principle of the common law which does not permit a plaintiff to litigate twice what is really the same matter. The principle involved is frequently stated in the form that no one shall be twice vexed for the same wrong, and it is clear, of course, that there really is one wrong, and only one, in these cases.

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(19) 11 Lea (Tenn.) 549.

CHAPTER III.

RECOVERY FOR BENEFITS CONFERRED WITHOUT A CONTRACT.

SECTION 1. RECOVERY OF MONEY PAID UNDER COMPULSION.

§ 26. No recovery if parties are "in pari delicto." It is the general principle of the law of quasi-contracts and a limitation upon the rule that the plaintiff may recover if the defendant has unjustly enriched himself at the plaintiff's expense, that if the plaintiff and defendant are equally guilty of engaging in an illegal transaction, the plaintiff will not be aided by the court in recovering of the defendant for the benefit conferred or obtained by the defendant. The ground of the refusal is not the merit of the defendant, nor that the defendant has not unjustly enriched himself at the expense of the plaintiff, but it is the demerit of the plaintiff. The court is not willing to aid a plaintiff of this character. In certain cases, however, in which the plaintiff has been, jointly with the defendant, engaged in an illegal transaction, the courts are willing to help the plaintiff in spite of the fact, because they believe the plaintiff is not equally guilty with the defendant. The principle that the plaintiff cannot recover where he has been equally guilty with the defendant of engaging in an illegal transaction, is well illustrated in the decision of Thompson v. Williams

(1) where the defendant purchased from the plaintiff on Sunday two cows, promising to pay for them at a later date. The defendant refused to pay for the cows, whereupon the plaintiff took them from the defendant. The defendant then sued the plaintiff in an action of trespass, and collected a judgment for the value of the cows, the jury finding that the value of the cows was the contract price agreed between the plaintiff and the defendant. Thereupon the plaintiff sued the defendant in assumpsit for the price of the cows. It appeared by the law of the state that it was illegal to transact business on Sunday. The contract therefore could not be enforced by the plaintiff; but the plaintiff argued that he was entitled to recover, not on the contract but on the quasi-contract on account of the unjust enrichment of the defendant at his expense. The court however held that the plaintiff could not recover, as he had been equally guilty with the defendant in engaging in an illegal transaction.

§ 27. **Transaction illegal on account of statute for protection of plaintiff.** In the case of Smith v. Bromley (2) the plaintiff sought to recover interest which he had paid to the defendant in excess of the legal rate, as established by the law against usury. The question for decision was whether the rule applied that the plaintiff cannot recover when he has been engaged in a common illegal transaction with the defendant. The statute made usurious contracts illegal. The court held, however, where a statute of this kind making certain contracts il-

(1) 58 N. H. 248.

(2) 2 Doug. 696.

legal was intended for the protection of one class against another, as in this case for the protection of the debtor against the creditor, the principle had no application; for to apply it would be to nullify the object of the statute and to permit the usurious creditor to keep the excessive interest which he was forbidden by the law to take. It was accordingly held that the plaintiff was entitled to recover.

§ 28. **Money paid under duress of goods.** In the case of Astley v. Reynolds (3) the plaintiff pawned certain plate with the defendant. When the plaintiff sought to redeem the same, the defendant demanded a much larger sum than he was entitled to, and the plaintiff finally, in order to get the plate, paid the amount demanded, recovered the plate, and then brought an action for money had and received to recover the excess. The defendant argued that the plaintiff was not entitled to recover, as he had voluntarily paid the sum. The court held however that this was not a voluntary payment, but one made under such compulsion that an action based on quasi-contract would lie. In other words the court in this case established the principle that when the defendant has property belonging to the plaintiff in his possession and refuses to surrender the same until the plaintiff pays a sum not legally due, the plaintiff may in order to obtain the property without delay, pay the sum thus illegally demanded and then recover the amount in a quasi-contractual action.

A case involving a similar principle is that of Irving

(3) 2 Strange 915.

v. Wilson (4) in which a public official illegally seized certain goods of the plaintiff. To induce him to surrender the goods, the plaintiff paid the sum to the official and it was held that he could recover the amount thus paid in an action for money had and received. In another case (5) the plaintiff was conducting his raft through the Penobscot river, and when he came near the boom of the defendant, which was erected under a charter from the state, he was unable to pass through the passageway left for that purpose, and by force of the wind and current his raft was driven out of the passage and stopped by the defendant's boom. The plaintiff and his assistants immediately endeavored to free the raft from the boom and conduct it through the passage, which he succeeded in doing in two or three hours. Later the defendant demanded of the plaintiff a certain sum, being the amount of the regular boomage for the raft, which the plaintiff refused to pay. The defendant thereupon stopped the raft until the plaintiff paid the sum demanded. The action was brought by the plaintiff to recover the sum thus exacted by the defendant, and the court held that the plaintiff was entitled to recover.

In the case of Tutt v. Ide (6) the defendants, as common carriers, agreed to carry goods from Boston to St. Louis for a certain sum. At St. Louis the carrier refused to deliver the goods to the plaintiff until he paid a much larger sum, which the plaintiff did in order to get the

(4) 4 T. R. 485.

(5) Chase v. Diwinal, 7 Greenl. (Me.) 134.

(6) 3 Blatch. (U. S.) 249.

goods. This also was held to be, as to the excess, not a voluntary payment, and so the plaintiff was allowed to recover for the same.

§ 29. **Money paid under compulsion of legal process.** In another case the defendant held a promissory note of the plaintiff, an ice dealer, which however the defendant knew was no longer enforceable because of a discharge of the plaintiff in bankruptcy. The defendant however began a proceeding to enforce the note, which on its face appeared to be enforceable, and at two o'clock on Monday morning he attached five carts belonging to the plaintiff, together with horses hitched thereto, which had just been loaded with ice and were ready to start to Boston to deliver the ice to customers. The defendant's attorney told the plaintiff that he could not start until the sum sought to be recovered on the note was paid. The plaintiff thereupon paid the sum demanded in order to be able to proceed to Boston and deliver his ice. In an action for money had and received he was allowed to recover the amount paid (7).

In another case (8) the defendant had filed a lien on the plaintiff's real estate, which on its face was valid, though in truth invalid. The plaintiff, being in debt and desiring to raise money by mortgage on his real estate, found it impossible to do so until the apparent lien was removed. The defendant, although he knew the lien was not valid, refused to discharge it on the record until the plaintiff should pay the alleged debt. Plaintiff thereupon

(7) Chandler v. Sanger, 114 Mass. 364.

(8) Joannin v. Ogilvie, 49 Minn. 564.

paid the amount demanded in order to get the lien discharged from the record and it was held that the compulsion was sufficient to entitle the plaintiff to recover the amount so paid.

In the case of Richardson v. Duncan (9) the defendant made a complaint to a justice of the peace that the plaintiff and his son had torn down the barns and house of the defendant, on the strength of which information a warrant was issued. The plaintiff and his son were taken before the magistrate for examination. The evidence showed that the plaintiff and his son had peaceably and quietly taken down an old house and barn that stood on defendant's land and had burned some refuse boards and shingles. The justice held the man and son for trial at the next term of the superior court, requiring a bond in the sum of $500 from each, with sureties. The defendant and others represented to the plaintiff and others that they would have to go to state's prison, and the result was that the plaintiff and his son could not get sureties on the bond. The defendant then told the plaintiff and his son that they had better settle the matter, and he offered to drop the matter for $125. Plaintiff assented and paid the sum sued for in pursuance of the agreement. It was held that he could recover. A case of this kind should be carefully distinguished from the payment made to stop a legitimate prosecution made in good faith, in which case the plaintiff would be equally guilty with the defendant of engaging in an illegal transaction and could

(9) 3 N. H. 508.

therefore recover nothing, as was held in the case of Daimouth v. Bennett (10).

§ 30. **Money paid under a judgment.** In Mariott v. Hampton (11) the plaintiff sought to recover money which he had paid the defendant under the following circumstances: The defendant, as plaintiff in the former suit, sued for goods sold. The plaintiff, as defendant in the former suit, had actually paid the sum demanded but could not find the receipt, and so was not able to establish the fact of payment, in consequence of which judgment was rendered against him, which he paid. Subsequently he brought the present action to recover the amount so paid. It was held that there could be no recovery. In a Pennsylvania case (12) the court expressed the reason for this as follows: "Money collected or paid upon lawful process cannot be recovered back, though not justly or lawfully due by the defendant in the execution to the plaintiff....The reason is a very obvious one. An execution is the end of the law. To permit money so collected or paid to be re-collected in a new suit would lead to infinite and endless litigation. If such suit could be maintained then another might be brought to recover the money paid on the judgment and execution in it, and so on ad infinitum."

Suppose a judgment be entered in favor of A by the trial court in a suit between A, the plaintiff, and B, the defendant. B intends to take an appeal. May he never-

(10) 15 Barb. 541.

(11) 7 T. R. 269.

(12) Federal Ins. Co. v. Robinson, 82 Pa. St. 357.

theless, in the mean time, pay the amount of the judgment, and then if the judgment be reversed on appeal, bring an action to recover the amount so paid? The answer to this seems to be in the affirmative. The reason is that the judgment when entered creates a legal duty to pay the money, and a payment of it is regarded as made under compulsion of law, and this is true even though the one against whom the judgment was rendered did not wait for execution to be issued and a levy made on his property (13).

§ 31. **Money paid to prevent illegal seizure for taxes.** In the case of Preston v. Boston (14) the plaintiff sued the city to recover a sum of money paid to the city for a tax assessed against him when he was not liable for the same because he was a non-resident of the city. He paid the same under protest, in order to prevent a seizure of his person and goods. Under the Massachusetts law it appeared that the tax officials had a right, in the case of a tax legally due, to seize summarily the person or property of the delinquent tax payer in order to collect the tax, and in this particular case the official had insisted that unless the plaintiff paid, he would proceed to act in pursuance of this law. The plaintiff was held entitled to recover the sum so paid. There is some discussion in these cases as to the necessity of protesting against the collection at the time payment is made in order to be able to recover in a suit against the official, but it seems clear that where the officer seizes the goods under

(13) Hosmer v. Barret, 2 Root (Conn.) 156.
(14) 12 Pick. (Mass.) 7.

color of process, as in the case just cited, no formal protest would be necessary. The safe way, however, in such a case, is to protest formally against the payment, stating to the officer that you do so only for the purpose of preventing the seizure of your goods, or of recovering the possession if they have already been seized, and not for the purpose of paying the tax, and farther that you expect later to sue and recover the sum so paid. In that case there can be no doubt of the recovery (15).

In all cases of this kind it must appear that the plaintiff made the payment under the threat and the compulsion of the process. For example, a recovery was denied in a case in which the plaintiff, having been arrested by the collector for not paying the tax, was released on agreeing to pay the same, and then at the end of the week did pay the amount alleged to be due. It was held that the compulsion of the imprisonment had ceased to act and that therefore the payment fell under the class of voluntary payments (16).

§ 32. **Money paid in discharge of a duty.** An interesting case is that of Wells v. Porter (17). The plaintiff had hogs at a distillery to be fattened. The defendants were tenants of the distillery and had failed to pay the rent when due, whereupon the landlord, in the exercise of his common-law right of distraint, seized the hogs belonging to the plaintiff as security for the payment of the rent due from the defendant. At common law

(15) Elliott v. Swartwout, 10 Peters (U. S.) 137.

(16) Fellows v. School District, 39 Me. 559.

(17) 7 Wend. (N. Y.) 119.

the landlord had the right to make a seizure of this kind, that is, the landlord, as security for the rent due, was entitled to seize and hold chattels on the land, even though they were not the property of the tenant but of someone else. In order to secure the return of his property, the plaintiff paid the rent to the landlord, and in this action sues to recover the sum so paid on the ground that it was money paid by the plaintiff to the use of the defendant. Following a celebrated English case decided much earlier (18) the court allowed a recovery.

In Brown v. Hodgson (19) the plaintiff was a common carrier and by mistake delivered property to the defendant instead of to the consignee. The defendant thereupon appropriated the property to his own use by selling the same and receiving the money for it. The plaintiff, the carrier, admitting its mistake, paid the consignee the value of the property and brought this action against the defendant for money paid to the use of the defendant. It is needless to say that the plaintiff recovered, the court holding that the payment by the carrier to the consignee was not a voluntary payment, but one made in pursuance of a legal duty. In another case (20) the plaintiff was also a common carrier, and the defendant refused to receive a horse which the plaintiff had carried for him unless they would let him have it without paying what was due them, which they of course refused to do. The plaintiff thereupon sent the horse to a livery

(18) Exall v. Partridge, 8 T. R. 308.

(19) 4 Taunt. 189.

(20) Great Northern Railroad v. Swaffield, L. R. 9 Ex. 132.

stable and paid the livery stable keeper the charges for boarding the same. The plaintiff was allowed to recover the sum so paid, from the defendant, although it was clear that the defendant could not have been sued for the sum in question by the livery stable keeper.

§ 33. **Contribution between joint wrong-doers.** It is often stated that as between joint wrong-doers, that is, as between people who have jointly committed a tort against a third person, no right of contribution exists. For example, if one of them is sued by the person injured and has to pay the whole damage, according to the rule as frequently stated, the one who has thus paid for the damage caused by the two has no action to recover a proportionate share of this amount from the other equally guilty party. This is of course supposed to be an application of the rule that where two persons are equally guilty, one cannot recover from the other, even though one has been unjustly enriched at the expense of the other. Here the enrichment, if any, takes place in a negative way, as it did in the cases we have just been discussing. The plaintiff has paid an obligation of the defendant's so that the defendant is no longer under an obligation. In other words, relieving a man from a liability is as much an enrichment as adding directly to his assets.

§ 34. **Same: Where recovery is allowed.** The rule as to contribution, however, as generally stated, is subject to certain qualifications, and must be explained, if it is not to mislead. For example, it is often true that two persons are both liable for the same wrongful act and yet

are not equally guilty. To illustrate: According to the law of torts, a master is liable in damages for a tort inflicted by his servant upon a third party, if the act was done while the servant was acting in the scope of his employment, that is, while he was doing the master's work. The servant is himself, of course, also liable to the injured party for the tort. Suppose now the master is sued for the tort of his servant, committed within the scope of his employment, but, let us say, in the absence of the master and in violation of the master's orders. The master is liable and if sued will have to pay the bill. The master is clearly not a joint wrong-doer in the sense of being equally guilty. The servant did the act; the master did not, but as a matter of law is simply responsible to third parties for the acts of his servant because the servant was doing his work. Indeed the act of the servant in cases of this kind is a clear breach of duty to the master. It would seem, therefore, that in a case of this kind the master ought to be allowed to recover from the servant the amount he has thus been forced to pay because of the servant's wrongful act, it being remembered that the payment by the master discharges the legal liability of the servant to the third person. As between the two the servant ought wholly to bear the burden. In Bailey v. Bussing (21) the decision was based upon this principle. In fact, the rule that there shall be no contribution between joint wrong-doers should be confined to cases, as Story says, "where the tort is a known meditated wrong and not where the party is acting under

(21) 28 Conn. 455.

the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction or inference of law. In the latter case . . . there may be and properly is a contribution allowed by law for such payments and expenditures between constructive wrongdoers.'' Citing this view of Story's, the court in a Pennsylvania case (22) decided that where two counties were jointly in charge of a bridge and negligently allowed it to get out of repair so that a third person was injured, and where the injured person had sued one county and recovered full compensation from that county, the county which had paid could recover from the other county a proportionate share of the amount paid. There is here some conflict in the authorities, some cases holding to the view that even in such a case there can be no contribution.

§ 35. **Contribution between co-contractors.** In Golsen v. Brand (23) the plaintiff and the defendant, each acting separately and for himself, wrote their names upon the back of a note, the legal effect of which in Illinois under the law at that time was to make each one a guarantor of the due payment of the note. The note was not paid by the maker and the holder collected the full amount from Brand, the plaintiff, who thereupon sued Golsen for contribution. Here clearly was a case where the liability, if any, was quasi-contractual, for Golsen and Brand had no dealings with each other in any way. A recovery of one-half the amount paid was allowed on

(22) Armstrong County v. Clarion County, 66 Pa. St. 218.

(23) 75 Ill. 148.

the ground that Brand had discharged not only his own but Golsen's obligation. They were under a common burden which equitably they ought to share equally, and one had borne the whole. In fact this case is merely an illustration of the principle which underlies the whole doctrine of contribution between co-sureties and co-guarantors in the law of suretyship and guaranty. See Suretyship in Volume VII of this work.

Section 2. Recovery for Benefits Conferred Without Request.

§ 36. Where plaintiff intends to benefit defendant. In the class of cases with which we shall next deal, it is assumed that no compulsion of law, or duress, legal or equitable, exists. The first rule in connection with the subject of the present chapter is that one who voluntarily plays the part of intermeddler, "an officious intermeddler" as he is often called, gets nothing for his pains. Take the simplest case: If A owes B a sum of money and C voluntarily and without the request or knowledge of A, pays B this sum for A; while the effect of this is to discharge the obligation from A to B, C acquires no right of reinbursement from A. Another simple case is where one intending to make a gift transfers property to another. He cannot, of course, subsequently change his mind and recover the value of the property in quasi-contract. This latter case is well illustrated by Robinson v. Cumming (24) in which the plaintiff sought to recover under the following circumstances: The plaintiff

(24) 2 Atk. 409.

was paying attention to a young lady, hoping to marry her, and while doing so made her presents worth about £120. She married another man and the plaintiff sued to recover the value of the presents, but it was held that he could not.

§ 37. **Same: Saving property.** Suppose the plaintiff finds the defendant's property in danger of being destroyed, and, although under no duty to do so, voluntarily takes it in charge, and in order to preserve it expends labor and materials upon it. May he recover from the owner the value of his labor and materials expended in the preservation of the defendant's property? It seems that the owner may say that he does not care for the property and may abandon it, in which case the one who has preserved it may recover nothing. But suppose, as in Chase v. Corcoran (25) the owner demands his property and, when the plaintiff refuses to surrender it until paid for the work of repairing, brings an action of replevin and recovers the property. Surely the owner must in such a case pay the reasonable cost of preserving his property, for had it not been for the plaintiff's act he would have had no property to recover in the replevin action. This was the result reached in the case cited. It is held, however, that the one who has preserved the property is not entitled to retain the property until he is paid; that is, he has no lien upon the property to secure the payment of the amount due, but is left to bring an action in quasi-contract for the same. In another case (26) the plaintiff re-

(25) 106 Mass. 286.

(26) Reeder v. Anderson's Admr., 4 Dana 193.

covered a reasonable compensation for his labor and expenses incurred in apprehending and restoring to the defendant a runaway slave.

We must, however, note one limitation on the doctrine of these cases, or rather an explanation of it. In order that the plaintiff recover it is necessary to find that he did the act, not as a gift or an act of mere neighborly kindness, but expecting to be paid for the same. The neighbor who, not expecting to be paid, saves my property from destruction, cannot afterward recover payment from me. This seems to be the basis of decision in the case of Bartholomew v. Jackson (27) in which the plaintiff had moved some stacks of wheat belonging to the defendant to a place of safety, thus preserving them from destruction by fire. The court in deciding that the plaintiff could not recover, said: "If a man humanely bestows his labor and even risks his life in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the services rendered as gratuitous and it therefore forms no ground of action."

§ 38. **Benefits conferred at request of third party.** It some times happens that a benefit is conferred by one person upon another without the request of that person but at the request and upon the credit of a third person. For example, in a case which arose in Massachusetts the plaintiff, at the request of the son of the defendant and relying on the son to pay him, had shod a horse belonging to the defendant. The son having failed to pay, the plaintiff sued the defendant, the owner of the horse, for

(27) 20 Johns. 28.

the benefit so conferred; but the court held very properly that no recovery could be had. The principle involved may be stated to be that where a benefit has been conferred by the plaintiff upon the defendant but without the request of the defendant, he cannot recover for the same if he expected another to pay him. In the case just cited, the plaintiff was content to bargain for the liability of the son, and so cannot hold the father (28).

§ 39. Improvements made in good faith upon another's land. Suppose that A is in the possession of land which really belongs to B, but which A honestly believes is his own, and A proceeds therefore to make extensive and valuable improvements. According to the principles of the law of real property as enforced by the common law courts, the improvements attached to the realty become a part of it and so belong to the owner of the realty, which in this case is B's. If, therefore, B brings the legal action known as ejectment he will succeed in putting A out of the premises. If he does so may A sue B in quasi-contract for the value of the improvement? Sitting in the United States circuit court in the case of Bright v. Boyd (29), Mr. Justice Story decided that he might do so by a bill in equity, it being equitable that he should do so, although he admitted that he had very little authority for so holding. It can hardly be said that the question has ever been clearly settled, and in many states it is now regulated by the so-called "betterment acts" which usually adopt a rule based upon a view very similar to

(28) Cahill v. Hall, 161 Mass. 512.

(29) 1 Story, 478.

that laid down by Story in the case just cited. Upon one point all the cases seem to be agreed, namely, that whenever in a case of this kind the person claiming the land has to appeal to a court of equity for relief, he will be required as a condition of obtaining relief to pay the value of the improvements. This question has arisen most often in suits for the redemption of premises, brought by the mortgagor against a person in possession who, for one reason or another, supposed the right to redeem had been lost and so believed honestly that he owned the premises free from incumbrances.

§ 40. **Recovery for services rendered by a supposed slave.** A case which, in view of the peonage cases in the southern states, may not be without practical importance today is Livingstone v. Ackestone (30). In this case Ackestone was a negro held to service by the defendant who bought him in good faith as a slave. It having turned out that he was not a slave, Ackestone sued the defendant for work and labor performed. Recovery was denied on the ground that the plaintiff thought he was a slave, and so had performed the services without expecting compensation; but this reasoning seems hardly sound, as the only basis for the application of the rule that one cannot recover where he does not expect compensation, is that one cannot be allowed to turn a gift into a sale. Here, however, no gift was intended—plaintiff supposed himself bound by his position as a slave to render the services. In a number of cases in which the defendant knew the person was not a slave and still obtained the services while con-

(30) 5 Cow. 531.

cealing the fact, a recovery was allowed, but upon the reasoning in Livingston v. Ackeston the plaintiff would be prevented from recovering here, it being equally true that the service was rendered without any expectation of compensation or of being paid for the same.

CHAPTER IV.

RECOVERY FOR BENEFITS CONFERRED UNDER A CONTRACT.

Section 1. Benefits Conferred Under a Mistake of Law.

§ 41. **Distinction between law and fact.** In some of the cases which we have discussed, the benefit was conferred by plaintiff upon the defendant under what lawyers call a mistake of fact, as distinguished from a mistake of law. We must now examine, somewhat carefully, the distinction between these two classes of mistake. In one sense the rules of law which govern the relations of men are facts. They are facts, for example, from the point of view of the historian of a legal system. For the purposes of the lawyer, however, it is necessary to draw the distinction between what are called rules of law, or shortly, the law, and other facts. We may perhaps put the matter as follows: The law is a body of rules attaching consequences to conduct or to states of fact. The defendant did certain things under certain surrounding circumstances—these are the facts. The rule which says that, given that state of facts, the defendant must compensate the plaintiff for the resulting damage is a rule of law.

§ 42. **Mistakes of law.** It is apparent that a plaintiff

may have paid the defendant money because he was mistaken as to the facts (in the sense just described) relating to a certain transaction, or it may be that he knew the facts, but applied to them a wrong rule of law, thus thinking himself liable to pay when he was not. It is clearly settled that if the mistake of the plaintiff be one of fact, he may recover from the defendant the value of the benefits conferred because of the mistake. Should it make any difference if the mistake be one of law? Apparently not. The unjust enrichment is as great in the one case as in the other. The law however seems to be that he cannot recover (except in certain cases) if money be paid or property be delivered under a mistake of law. No sound reason, it seems, has ever been given for this rule. Apparently it had its origin in a misstatement by Lord Ellenborough in 1802 of the maxim that "Ignorance of the law excuses no man," his rendering of which was as follows: "Every man must be taken to be cognizant of the law" (1)—a statement which was not, and never had been, a legal principle. Acting upon his statement, many courts apply the supposed principle logically and permit no recovery in quasi-contract where the mistake was as to the law. There has been, however, more or less consciously, a decided attempt on the part of many courts to limit this doctrine as much as possible, and in a few jurisdictions perhaps even to get away from it entirely. In time the law may be modified to accord with sound principle in this respect. Space fails in which to go into detail regarding the limits placed by the courts upon the

(1) Bilbie v. Lumley, 2 East. 469.

doctrine, but chief among them is the rule that the government or a public corporation (city, town, village, or county) may recover money paid under a mistake of law by the disbursing officer of the government or public corporation. It is also held that a court will compel its own officers to do equity, and therefore, when a receiver appointed by the court has had money paid to him under a mistake of law, he will be compelled to refund it. For further details see the article on Equity in Volume VI of this work.

Section 2. Benefits Conferred Under a Mistake of Fact.

§ 43. Mistake of fact as to existence of contract. Assuming that the mistake is one of fact and not of law, let us examine the question of recovery where money is paid or property transferred in the belief that a contract has been entered into, and it turns out that such is not the fact. May the one who has parted with his money or his property recover the value of the same? This question was involved in Martin v. Sitwell (2) in which the plaintiff paid the defendant for a policy of insurance on certain goods supposed to be on board a certain vessel. In fact the goods were not on board, and the policy was therefore void. The court held that, since the plaintiff had failed to receive what he bargained for, namely, the binding promise of the defendant, he could recover in general assumpsit the amount paid. Similarly in Van Deusen v. Blum (3) plaintiff furnished to a partnership

(2) 1 Shower 156.

(3) 18 Pick. (Mass.) 229.

labor and materials, in pursuance, as he supposed, of a contract binding on the defendants, who were carrying on business as co-partners. It appeared that the member of the firm who signed and sealed the contract on behalf of the firm had no authority to enter into sealed contracts binding the firm, and the plaintiff therefore could not recover the contract price. It was held, however, that he could recover in quasi-contract the reasonable value of the labor and materials furnished.

§ 44. **Mistake as to the subject matter of the contract.** Suppose the plaintiff has bought and paid for something which turns out to have no existence. That is to say, a mistake of fact is made as to the existence of the thing which formed the subject matter of the contract. It is clear that a recovery will be allowed in such a case. For example, in D'Utricht v. Melchor (4) the plaintiff bought what he supposed was a tract of land from the defendant who had, as he thought, bought it of another person. But upon investigation no land corresponding to the description in the deed could be found. Plaintiff was allowed to recover from the defendant the consideration which he had paid. An excellent illustration of the fundamental principle which underlies nearly all quasi-contracts is seen in the case of Jones v. Ryde (5), in which it appeared that the defendant had sold the plaintiff a naval bond which had ceased to be valid because its amount had been fraudulently raised. The government, however, although under no legal obligation to do so, paid the plaintiff the

(4) 1 Dall. (U. S.) 428.

(5) 5 Taunt. 488.

amount for which it was originally issued. In a suit by the plaintiff against the defendant, he was allowed to recover what he had paid the defendant, less what he had received from the government—that is, the amount of the unjust enrichment of the defendant at the expense of the plaintiff.

§ 45. **Mistake as to title of seller: Personal property.** Suppose I buy a horse of A, paying him cash, and later it turns out that he had no title and I am compelled to surrender the horse to the rightful owner. May I recover from A the price paid? Curiously enough the answer to this question was for a long time in doubt, owing to the supposed meaning of the doctrine of caveat emptor (let the buyer beware). It was argued that the plaintiff, the buyer, took the risk of the defendant having the title. Not until 1864 was the question finally settled in England, when it was laid down that when one sells as his own personal property which belongs to another, he must repay to the buyer the money received for the same. This decision was reached in the case of Eichholz v. Bannister (6), the court holding that where the defendant sold the property as his own, there was an implied warranty by the seller that he had title. In the earlier case of Morley v. Attenboro (7), the defendant was a pawnbroker and plaintiff bought from him property which he knew was pawned to the defendant, the time for the redemption by the pawnor having expired. It appeared that the article

(6) 17 C. B. (N. S.) 708.
(7) 3 Ex. 500.

had been pawned by one who did not own it, and of course the pawnbroker had no title. It was held however that the pawnbroker in such a case was not to be regarded as selling the goods as his own or as representing anything more than that so far as he knew his title was good. The risk, therefore, of the title being good, was held to be on the plaintiff and a recovery was denied. The whole question, therefore, appears in these cases to turn on the existence of a warranty in fact, express or implied. No recovery can be had upon a quasi-contractual basis.

§ 46. **Same: Real property.** In the case of real property, owing to the forms used in deeds conveying title to realty, different considerations govern the question. For our purpose, deeds conveying title to realty may be divided into two classes: (1) those that contain covenants of warranty, that is, covenants guaranteeing that the seller has a good title; and, (2) quit-claim deeds, which contain no such provision, but purport to convey to the grantee only whatever title the grantor has. Given the existence of these two classes of deeds, it seems clear that one who has taken a quit-claim deed must understand that his grantor does not warrant or represent that he has title, for if he did, a warranty deed would be the natural thing to give. Upon this principle the cases relating to realty are settled, and apparently there has never been any doubt upon the subject in any of the reported cases. Here again, therefore, the recovery if one can be had, must be upon an actual contract of warranty, and not upon a quasi-contract.

SECTION 3. PLAINTIFF IN DEFAULT UNDER A CONTRACT.

§ 47. **Wilful default.** In the cases with which we shall deal in this section it is assumed that the plaintiff, although he has partially performed, has been guilty of a breach of his promise of such a character that he cannot recover from the defendant for a breach of the contract. What will amount to such a breach is discussed in the article on Contracts elsewhere in this volume. Any right of the plaintiff to recover in a case of this kind, must, therefore, from the nature of things, be quasi-contractual, and rest upon the fundamental principle of unjust enrichment. Not only, in a case of this kind, is the plaintiff precluded from suing the defendant for a breach of the actual contract but, in addition, the defendant has an action against the plaintiff for the failure of the latter to perform his promise. Suppose now under these circumstances the plaintiff had, before the breach on his part, partially performed his promise, and so had conferred a benefit upon the defendant, so as to result in an enrichment of the defendant at the expense of the plaintiff. The generally accepted doctrine seems to be that the plaintiff is not in a case of this kind entitled to recover anything, on the ground that it is his own fault that the condition of which he complains has arisen. For example, in Champlin v. Rowley (8) the plaintiff sued the defendant for hay sold and delivered. The plaintiff had agreed to deliver a hundred tons of hay on certain dates at an agreed price per ton. The plaintiff had delivered only 52 tons and offered no excuse for failing to

(8) 18 Wend. (N. Y.) 187.

deliver the balance. His action was to recover for the hay actually delivered. The court decided that the plaintiff could recover nothing, on the ground that the defendant, when he accepted the hay that was delivered, did so in the expectation that the plaintiff would deliver the balance, and so cannot be held to have waived the right to call for the balance or in any way to have consented to or condoned the plaintiff's breach.

§ 48. **Inexcusable but not wilful default.** It sometimes happens that the plaintiff acting in good faith has unintentionally but inexcusably failed to perform a term in a contract, the performance of which is indispensable to a recovery on his part upon the contract itself. May he in a case of this kind recover anything in a quasi-contractual action, if he has, in part performance of his promise, conferred benefits upon the defendant? Upon this point there seems to be a conflict of authority. For example, in Blood v. Wilson (9) the law is stated as follows: "It is well settled in this commonwealth that when the special contract has not been fully performed, but the plaintiff has in good faith done what he believes to be a compliance with the contract, and has thus rendered a benefit to the defendant, he can recover the value of his services not exceeding the contract price, after deducting the damages which the defendant has sustained by the breach of the contract."

In other jurisdictions, however, a recovery under similar circumstances is denied.

§ 49. **Performance impossible.** In other cases the

(9) 141 Mass. 25.

plaintiff, by reason of the non-performance of a term of the contract, has lost any right to call upon the defendant for performance, and yet is not liable to a suit by the defendant for his non-performance, for the reason that performance had become impossible, owing to circumstances beyond the plaintiff's control. Under such circumstances neither party can hold the other to the terms of the contract. Can the law, consistently with the existence of the terms of the contract, compel the defendant to pay the plaintiff for any benefit which he may have received from the plaintiff by reason of the part performance? The English courts apparently deny that the plaintiff can recover in any case of this kind, but in many American jurisdictions a recovery is allowed, if to do so is not inconsistent with the purpose for which the term of the contract which has been broken was inserted. For example, in Parker v. Macomber (10) the plaintiff sued for the value of services rendered the defendant under the following circumstances: The plaintiff agreed with the defendant that the plaintiff and his wife would live in the house of the defendant and care for and maintain her during her natural life, and the defendant agreed that in consideration of these services she would charge no rent for the house and pay eight dollars per month board. The plaintiff's wife died before the defendant, so that the agreement could not be carried out for its whole term. Plaintiff thereupon furnished a housekeeper in place of the wife for a time, but the defendant shortly thereafter notified the plaintiff to leave, which the plain-

(10) 17 R. I. 674.

tiff did. The court, after deciding that the defendant had a right to treat the contract as at an end, because the plaintiff could not perform it according to its conditions, held that, as the death of the wife rendered the plaintiff's default excusable, he could recover the reasonable value of the services actually rendered. The view of the court seems to be that the situation which arose was not one within the contemplation of the parties at the time the agreement was made, and therefore to allow a recovery is not inconsistent with any purpose for which the term of the contract requiring performance by the plaintiff was inserted. In accordance with this principle, it has been held that while ordinarily a plaintiff who is prevented by sickness from performing the full services contracted for may recover for the services rendered, he cannot do so if the sickness should have been foreseen (11).

§ 50. **Plaintiff able to plead the statute of frauds.** Suppose that, in any of the cases previously discussed in this section, the plaintiff although in default may defeat any action by the defendant for breach of the contract by pleading the statute of frauds. Will this alter the situation? It would seem not. If we take the view of the effect of the statute of frauds which is held by a majority of the courts, namely, that it does not render the agreement a legal nullity, but merely gives to the person sought to be charged on it a defense which he may set up if he wishes, the situation seems to be as follows: The plaintiff has given the defendant a right to sue for breach of the contract, to which, however, the plaintiff has a de-

(11) Jennings v. Lyon, 39 Wis. 553.

fense. How can the existence of this right on the part of the plaintiff to defeat the defendant if the latter sue him for breach of the contract, give him any greater rights to sue the defendant on a quasi-contractual basis for benefits conferred by his performance, than he has in the case where he has no defense to a similar suit by the defendant? Exempting him from all liability for damage inflicted on the defendant by his failure to keep his promise certainly cannot strengthen his position as a plaintiff in the quasi-contractual action. If on the other hand, we take the view of a minority of the courts, that the effect of the statute is to render the agreement a legal nullity, that is, no contract at all, it would seem that the result ought to be the same. Under this view of the statute, the plaintiff has conferred a benefit upon the defendant and it was not conferred (as in the other case) in pursuance of a contractual duty to do so; but can the plaintiff complain of anything inequitable in the conduct of the defendant, when he refuses to pay anything until the plaintiff carries out his promise? It would seem not. But apparently, as far as the question has been passed upon by the courts which take this second view of the statute, it is held that the plaintiff is entitled to recover in quasi-contract the value of the benefits conferred even though he has broken his promise wilfully.

§ 51. **Performance illegal.** Suppose the contract between the plaintiff and defendant involves the doing of illegal acts, and that, after performance in part by doing certain legal acts and conferring a benefit thereby upon the defendant, the plaintiff seeks to disaffirm the agree-

ment because of its illegality and to recover the value of the benefits conferred. In this connection it becomes important to distinguish between acts which are regarded by the law as illegal because immoral or evil from their very nature (malum in se), and acts which are illegal because prohibited by the law, although in and of themselves they are innocent (malum prohibitum). If the act which makes the agreement illegal is malum in se the plaintiff, although he sues in disaffirmance of the agreement, is not permitted to recover. On the other hand, if the illegality arises from an act which is merely malum prohibitum, the plaintiff, on disaffirming the contract, may recover the benefits conferred. For example, a statute of Massachusetts prohibited bankers from agreeing to pay money at a fixed time in the future. The plaintiff deposited money with the defendant under an agreement of this kind. The court held that he might recover in a count for money had and received, brought in disaffirmance of the agreement and before the expiration of the time named on the ground that the act in question was malum prohibitum only (12).

SECTION 4. DEFENDANT IN DEFAULT UNDER A CONTRACT.

§ 52. Defendant wilfully or inexcusably in default. If there be a valid and enforceable contract between the plaintiff and the defendant, and the defendant is guilty of a wilful, or a legally inexcusable but not wilful, breach of the same, the plaintiff may of course sue for the damages due to the breach. Our question however is, may the

(12) White v. Franklin Bank, 22 Pick. (Mass.) 181.

plaintiff say to the defendant: "You have chosen to break the contract; the result is that I am freed from all obligation to perform, and I may therefore treat the contract as ended. I am, as a result, entitled to sue in quasi-contract to recover the value of the benefits which I have conferred upon you by way of part or full performance of my promises before you were guilty of the breach." In the case of Nash v. Towne (13) the Supreme Court of the United States decided that the plaintiff was entitled to do so. The facts were as follows: The plaintiff paid the defendant $5,500, in consideration for which the defendant sold to the plaintiff certain wheat which the defendant had. The wheat was left in the possession of the defendant, and, instead of delivering it according to the agreement, the defendant sold and delivered it to other parties. The plaintiff thereupon sued, not to recover damages for the breach of the promise to deliver, nor in tort for the conversion of the wheat (the court holding that the title to the wheat passed to the plaintiff at the time the contract was made), nor in quasi-contract for the money received by the defendant for the wheat from the third party to whom he sold it; but for money had and received in the shape of the amount the plaintiff had paid the defendant. The court decided that the plaintiff was entitled to recover this amount.

In order to permit the plaintiff to sue in quasi-contract in a case of this kind, it must appear not only that the defendant has been guilty of a breach of the contract, but that the breach is of a sufficiently serious character to en-

(13) 5 Wall. 689.

title the plaintiff to consider the contract as repudiated by the defendant and so at an end. It is also held in cases of this kind that if the plaintiff received anything from the defendant in part performance of his promise, the plaintiff must restore or offer to restore the same to the defendant as a condition of demanding the return of what he gave the defendant. For example, in Miner v. Bradley (14) the plaintiff had agreed to buy from the defendant a cow and some hay, for a lump sum. The plaintiff had paid for both, and had received the cow. The defendant refused to deliver the hay, and the plaintiff brought an action to recover the amount paid, but failed to offer the return of the cow. It was held that he could not recover. It is of course sufficient for the plaintiff to offer to return the things received from the defendant; a refusal from the defendant to accept them does not prevent the plaintiff's action from arising (15).

§ 53. **Performance impossible.** If, after the plaintiff has performed the contract in whole or in part, performance by the defendant is rendered impossible by circumstances for which the defendant is not legally responsible, the defendant is thereby excused from performing so that he is not liable to an action for breach of the contract. It by no means follows that the defendant is to be allowed to retain the benefits which he has received from the plaintiff without paying for them. To allow him to do so would be clearly inequitable. It is accordingly held, at least by the American authorities, that the plaintiff

(14) 22 Pick. (Mass.) 457.

(15) Terry v. Allis, 16 Wis. 478.

may recover in quasi-contract the value of the benefits conferred under such circumstances. For example, in Reina v. Cross (16) the plaintiff sought to recover sums paid in advance to the master of a vessel for freight on goods to be transported by the vessel. The vessel was shipwrecked and lost. It was held that the plaintiff could recover. The English authorities take the opposite view. In Byrne v. Schiller (17), Cockburn, C. J., after stating the English law, said: "I regret that the law is so. I think it founded upon an erroneous principle and anything but sound; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity to the American doctrine and contrary to ours."

§ 54. **Defendant able to plead the statute of frauds.** Suppose that the agreement made between the plaintiff and defendant is unenforceable because within the provisions of the statute of frauds, so that the defendant, if sued upon the contract, may plead the statute as a defense. May the plaintiff, who under these circumstances has in partial performance of his promise conferred a benefit upon the defendant, recover the value of the same in quasi-contract? Let us take a concrete case: An agreement not to be performed within a year is in many jurisdictions not enforceable unless in writing. Suppose the plaintiff and the defendant have orally agreed that the plaintiff shall perform work and labor for the de-

(16) 6 Cal. 29.

(17) L. R. 6 Ex. 319.

fendant for a period exceeding a year, the defendant to pay the plaintiff a lump sum at the end of the period. If the plaintiff, in pursuance of the oral agreement, has partially or fully performed his promise, he is nevertheless forbidden by the statute from suing on the contract. Clearly, however, it is not just for the defendant to appropriate the plaintiff's services for nothing, and the courts accordingly hold that the plaintiff may recover the reasonable value of the services rendered. The statute simply says that the plaintiff shall not hold the defendant upon the contract; to compel him, on the principle of unjust enrichment, to pay the plaintiff the reasonable value of the services obtained is not in any way to enforce the contract. The same result is reached, apparently, whether the effect of the statute is regarded as simply rendering the contract unenforceable or as making it a legal nullity (18).

§ 55. **Performance illegal.** In the class of cases which we have now to consider, the defendant, it is assumed, has been guilty of the breach of an illegal agreement, and in addition to breaking his agreement, insists upon retaining the benefits which he has received from the plaintiff in part performance of his promise. May he do so or must he restore to the plaintiff the value of the benefits thus received? Attention has already been called in another place (19) to the rule that the court refuses to impose, upon the principles of unjust enrichment, an obligation upon the defendant in favor of a plaintiff who, in

(18) Ellis v. Carey, 74 Wis. 176; Wonsettler v. Lee, 40 Kan. 367.

(19) See § 26, above.

the eyes of the courts, is equally guilty with the defendant of engaging in an illegal transaction. This rule obviously applies here. No matter how much the defendant has received from the plaintiff, if the plaintiff is equally guilty with the defendant, the plaintiff can recover nothing (20).

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(20) Morgan v. Groff, 5 Den. (N. Y.) 364.

CHAPTER V.

QUASI-CONTRACTUAL OBLIGATIONS IN THE LAW OF PERSONS.

§ 56. **Liability of infant for necessaries.** According to the law of contracts, an infant may plead the fact of his infancy as a personal defense, when sued upon an agreement he has made. It is often said that this is not true of agreements made by infants to pay for necessaries furnished. It seems, however, that even where the promise of the infant is made in consideration of necessaries furnished him, he may plead his infancy to any suit upon his actual promise; but that the law imposes upon him a duty, on the basis of the principle of unjust enrichment, to pay the reasonable value of the necessaries received. It must be admitted that there is considerable confusion in the cases upon this point, but when we remember that in an action against an infant for the value of necessaries furnished, the infant is compelled to pay, not the price agreed upon, but only the reasonable value of the necessaries, the quasi-contractual nature of the obligation is clearly apparent (1). See Part IV of the article on Domestic Relations and Persons in Volume II of this work.

§ 57. **Liability of insane person for necessaries.** No general statement can be made which will apply in all

(1) Trainer v. Trumbull, 141 Mass. 527.

jurisdictions as to the contractual capacity of an insane person. In some jurisdictions the courts deny that he is capable of making any contracts whatever. In others he has a certain limited capacity to contract. See the article on Contracts, §§68-72, earlier in this volume. In all jurisdictions, however, whatever view may be taken of his contractual capacity, he may be sued in an action of assumpsit to recover the reasonable value of necessaries furnished. It is clear that this obligation also, like that of an infant, is a duty imposed by law upon the principle of unjust enrichment (2).

§ 58. **Liability of husband for wife's necessaries.** It is often stated that a wife has an implied authority to pledge her husband's credit for necessaries furnished her. The truth of this statement depends upon the circumstances. If the wife be living at home with her husband and has been permitted by the husband to order supplies of different kinds for the household, and the husband has been in the habit of paying for them, we have to do with a simple case of agency. Suppose, however, the husband, the wife not being at fault in any way, has refused to furnish the wife the necessaries of existence. It is well settled that, under these circumstances, even though the husband notifies all persons that he will not pay for things furnished his wife, anyone to whom the wife applies may furnish the wife with necessaries upon the credit of the husband, and thereafter sue the husband to recover the reasonable value of the necessaries furnished. Obviously, in a case of this kind, the wife has

(2) Rhodes v. Rhodes, 44 Ch. D. 94, 105.

no actual authority from the husband to pledge his credit. A more extreme case will perhaps bring out the true situation. Suppose the wife, driven out of house and home by the husband through no fault on her part, is found in an unconscious condition by the plaintiff, and he furnishes the necessary shelter and medical attendance required by the circumstances. Without doubt the plaintiff may in such a case recover from the husband the reasonable value of the services rendered. If under such circumstances the wife should die and the plaintiff should pay the necessary funeral expenses incurred, he could undoubtedly recover in quasi-contract from the husband for the expenditure (3). See Part II of the article on Domestic Relations and Persons in Volume II of this work.

§ 59. **Liability of father for necessaries furnished child.** In some, but not all, jurisdictions the father is regarded as being under a legal duty to support his child. His duty to pay a third person, who has furnished necessaries to the child whom the father has refused to support, is clearly another quasi-contractual obligation (4). See Part III of the article on Domestic Relations and Persons in Volume II of this work.

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(3) Jenkins v. Tucker, 1 H. Bl. 90.

(4) Gilley v. Gilley, 79 Me. 292.

AGENCY.

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CHAPTER I.

FUNDAMENTAL CONCEPTIONS.

§ 1. **The function of agency.** The size and complexity of the modern business enterprise make action through representatives a necessary supplement to direct and personal action. Undertakings involving special knowledge or skill, transactions taking place in widely separated parts of the world, form part of a business under a single head. Corporate organization necessarily involves action through representatives. An insurance company with its management resident in New York, if it wishes to write policies in San Francisco, will find it practically necessary to appoint a representative to act for it there. In

general such a representative, authorized by a competent person to act, and acting under his direction and control, is an agent, and the authorizing person is called a principal. It should be observed, however, that an agent is only one type of representative through whom a principal may accomplish his ends. He is to be distinguished from other representatives chiefly by the facts that he owes his appointment to the principal and is subject to the principal's direction in the details of execution of the task he is authorized to perform.

§ 2. **Agent and servant: Definitions.** In its broader sense the word agent denotes a person who represents his principal and acts under his direction, whether in performing merely operative acts or in bringing the principal into relation with third parties. More narrowly, when the employment does not necessarily involve a third party in relations with the principal—for instance when it is such an operative act as plowing the principal's field or painting his portrait—the relation is spoken of as that of master and servant, and the relation of principal and agent is confined to the bringing of the principal into contractual relations with third parties. Of course the same person may be for certain acts a servant and for others an agent, as for example when P's plowman purchases oats for the farm horses on P's credit.

§ 3. **Responsibility for the agent's acts.** To give legal sanction and aid to the extension of the principal's personality through the acts of his representatives is a boon to the principal for which the law exacts a return. One who receives the benefit of the increased capacity to act

given him through agents must bear the burden of responsibility within reasonable limits for the acts they do. But the agent may do things he is not authorized by his principal to do: he may act negligently, or may disobey his master and act in reckless or wilful disregard of the rights of others with whom his occupation brings him in contact. Yet within limits the principal is responsible for these acts also. It is the function of the law of agency to fix these limits of responsibility.

§ 4. **Personal character of the relation.** Again, since the principal's selection of his representative depends on his belief in the agent's skill, prudence, diligence, and especially his fidelity, and since the agent's willingness to accept the appointment also depends largely on the personal qualities of the principal, the personal element, and particularly the fiduciary element, in the relation is an important factor in shaping the legal doctrines of agency. Out of these two fundamental ideas—that certain acts of a representative may, for purposes of fixing legal rights and duties, be attributed to his principal, and that the relation in its formation and its conduct, particularly as regards the rights and duties of the principal and the agent, is a personal one—the distinguishing features of the law of agency may be said to be developed.

§ 5. **Purposes for which an agency may be created.** In general any lawful business may be transacted through agents, and an agency may be created for the purpose of doing any act which the principal can lawfully do himself in his own behalf. One cannot do through an agent what one is forbidden by law to do oneself. Hence

agencies cannot be created to do acts illegal or violative of public policy, or even having a natural and direct tendency to promote the commission of such acts. The inquiry of the law is not as to whether in a particular undertaking anything improper was done or intended, but whether the natural and probable tendency of such an undertaking was to lead to acts opposed to public policy or law. So for example contracts of agency which require the agent to commit crimes, to endeavor to bribe the servant of another, to deal in prohibited articles, to seek to suppress a criminal suit, or to further and increase litigation—such acts and all others of similar character and tendency are declared void (1).

A principal not only cannot appoint an agent to do an act which he cannot legally do himself, but also he cannot appoint him to do any act which the law or an agreement of the parties requires the principal to do in person. Thus an agent cannot exercise the principal's political franchise for him. Nor can a public officer whose duties require the exercise of judgment and discretion delegate the performance of these duties to an agent (2).

§ 6. **The parties involved in the relation.** At least two parties are involved in the relation of agency: the principal who authorizes the agent to act for him, and the agent who acts. If the authorization contemplates the bringing of the principal into contractual relations with others a third party may be involved. Or the existing rights of third parties may be affected apart from con-

(1) Mexican Banking Co. v. Lichtenstein, 10 Utah 338; Lum v. McEwen, 56 Minn. 278; Sullivan v. Horgan, 17 R. I. 109.

(2) Lyon v. Jerome, 26 Wend. 485.

tract by the performance of the agent's duties. The law of agency then concerns itself with the relations arising out of agency between the principal and the agent, the principal and the third party, and the agent and the third party.

PART 1.

THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

CHAPTER II.

THE FORMATION OF THE RELATION.

SECTION 1. COMPETENCY OF THE PARTIES.

§ 7. **Capacity to act as principal.** Generally capacity to act as a principal depends on capacity to do directly the act which the appointment contemplates having done through an agent. One cannot do through an agent what one is legally incapable of doing in person, but anyone who can make a valid contract can authorize an agent to make it. Conversely, the limits on one's capacity to make binding contracts are the limits of one's capacity to appoint agents.

§ 8. **Same: Infants as principals.** In general the contracts of infants, except for necessaries, are voidable at their option; in other words an infant can perform or repudiate his obligation at his election. The better authority seems to be that the same rule holds true as to his appointment of an agent (1). Some states, however, do not permit infants to appoint agents, and the majority of American jurisdictions hold that for some or for all pur-

(1) Hardy v. Waters, 38 Me. 450.

poses such appointments are absolutely void (2). This is most widely held in cases of appointment for execution of a formal instrument under seal called a power of attorney (3). Contracts for necessaries furnished to an infant are binding whether made by the infant or by an agent. Where an appointment is held void, contracts made under its authority cannot subsequently be ratified by the infant. Where the appointment is held merely voidable, only the infant can avoid it; it is enforceable against the party with whom the agent made it (4).

§ 9. **Same: Married women.** At common law a married woman could not make any contract, but in most states her common law inability has been in whole or in part removed. Generally so far as she has been given power to contract or do other acts she may do them through agents, unless enabling statutes expressly require personal action on her part. This sometimes occurs in the case of the execution of instruments such as conveyances (5).

§ 10. **Same: Insane persons.** The weight of American authority is that contracts of insane persons are voidable as against those who know of the principal's insanity, or who are charged with notice by the fact that the principal has been declared insane by a court of law. In other cases the contract is binding if it has been so far executed that the other party to it cannot be put in statu quo. These doctrines apply to contracts made by an agent ap-

(2) Cal. Civil Code, Sec. 33.
(3) Lawrence v. McArter, 10 Ohio 37.
(4) Patterson v. Lippincott, 47 N. J. L. 457.
(5) Sumner v. Conant, 10 Vt. 9.

pointed by an insane person. But some courts hold that a power of attorney executed by an insane person is void, and in some states this is law by statutory enactment (6).

§ 11. **Same: Corporations.** A corporation after it has been organized can authorize an agent to do any act it has been given charter power itself to do. Prior to its incorporation there can be no agency for it, and acts done by persons professing to act in the name of a corporation to be formed are not binding on the corporation unless it adopts them as its own subsequent to the incorporation (7).

§ 12. **Same: Partnerships.** A partnership as such, not being a legal entity, does not appoint agents, but the partners jointly may do so, and generally each partner has implied authority to appoint agents to carry out any of the purposes for which the firm exists (8).

§ 13. **Same: Unincorporated associations.** Since these organizations are not legal entities they cannot as organizations appoint agents. They are not even partnerships, so that individual members cannot appoint agents to bind the society; but the members, acting as joint principals, may jointly appoint an agent. Such appointments are binding only on those members who expressly or impliedly assent to them and mere membership in the society is not sufficient to constitute an assent. So in a suit brought by the publishers of a college annual against the senior class of Tufts College it was proved that all the

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(6) Dexter v. Hall, 15 Wall. 9; Cal. Civil Code, sec. 38-40.

(7) Bell's Gap Ry. Co. v. Christie, 79 Pa. 54.

(8) Tillier v. Whitehead, 1 Dallas 269.

members of the class but one were present at a meeting, voted to elect one A their business manager, and authorized him to make arrangements for publishing the book. Those voting, or assenting by presence and silence to the vote, were held liable, but the absent member was held not liable for the acts of the agent (9). But a member may by previous assent be bound by the act of a majority, as for example where he signs a constitution which recognizes the power of a majority to bind the society by its action.

§ 14. **Capacity to act as agent.** As far as third parties are concerned, anyone may act as agent in representing a principal in dealings with them, except in cases of special sorts of agents, such as attorneys at law, where the law fixes certain requirements, and in the case of the usual provisions of the statute of frauds, which prevents the agent who makes the memorandum required by the statute from being in fact the other principal (10). As between the agent and the principal, the ordinary rules of contractual capacity apply. If the agent is an infant he may disaffirm his contract of employment, but if he chooses to abide by it the principal is bound on his side.

Section 2. Formation of the Relation by Prior Agreement.

§ 15. **Essentials of the relation.** The ordinary way in which the relation of agency is formed is by a contract between the principal and the agent, by which the agent agrees to act as the principal's representative, and the

(9) Willcox v. Arnold, 162 Mass. 577.

(10) Farebrother v. Simmons, 5 B. & Ald. 33.

principal to compensate the agent for his services. But the agreement may fall short of being a contract. All that is essential is an appointment by the principal and an acting under it by the agent. In the case of Barr v. Lapsley (11) a certain P (12) made an offer to one T to take some bagging at a set price in liquidation of notes which P held against T, and named one A as authorized to conclude the agreement. T notified A that he accepted P's offer but found that A had no word directly from P of his appointment, and that he therefore declined to act for P. T, however, relied on his acceptance as completing the contract with P, and brought a bill in equity to compel specific performance on P's part of the agreement to take the bagging. The question raised by the facts was whether the mere nomination of A as agent by P created the relation of agency unless A consented. The court held that it did not. A man cannot be made agent against his will. In every real agency there is mutual consent of the principal and his representative.

§ 16. **Implied assent.** It is not necessary that this consent be expressed in words. It may be implied from the circumstances of a case. Thus when a wife, whose husband's work frequently took him away from home for considerable periods, during which time she managed the household, borrowed money for use in a family matter,

(11) Barr v. Lapsley, 1 Wheat. 151.

(12) For purposes of convenience the initials P, A, and T will be used instead of the real names of parties in the cases discussed. P will stand for the name of the party who is a principal, A for the name of his agent, and T for the name of the third party.

the circumstances were held to show, even in the absence of any express appointment, that she was her husband's agent (13).

§ 17. **Gratuitous agency.** It is not necessary that the agent receive any compensation for his services. In the case of Hill v. Morey (14), A, a neighbor of P's, merely out of friendliness offered to assist P in cutting down brush on the latter's woodlot. P permitted him to help, and A during the work carelessly cut trees on an adjacent lot belonging to T. A was held to be P's agent so as to make P liable for the trespass. He had acted for P, P had permitted him to do so, and nothing further was needed to establish an agency. As between P and A, however, a mere gratuitous promise by A to act as P's agent could not be enforced by P.

SECTION 3. FORMATION OF THE RELATION BY RATIFICATION.

§ 18. **Ratification: Definition.** It sometimes happens that an agent overstepping the authority he has been given, or one who has never been appointed an agent assuming to act in that capacity, does an act on a principal's behalf and in his name. For example, A, a farm hand, without authority to purchase land for P, his absent employer, learns of an exceptional opportunity to buy a field adjoining P's farm at a bargain, and ventures to buy it on his master's credit, T, its owner, thinking A has the requisite authority. A then writes to P of what he has done. As the act was without any authority on A's part, P is not obligated by it and may disavow it. But he has

(13) Meader v. Page, 39 Vt. 306.

(14) Hill v. Morey, 26 Vt. 178.

a right to assent to it and treat it as his own. If he chooses this alternative he is said to ratify A's unauthorized act. The contract made by A is binding on T, and P and A are placed in the same relation as if A had been previously authorized by P to act as he did. In one sense A is by ratification made an agent for P for the act already performed; but strictly speaking ratification is not equivalent to appointment. A does not receive any authority for future transactions, but merely as to a consummated act he is treated as if he had been an agent, and the results of ratification for all the parties are similar to those resulting from a regularly authorized transaction carried out through an agent.

§ 19. **Ratification is equivalent to prior authorization.** If A in Illinois, without having authority from P, makes a promissory note in P's name, payable to T and dated April 1, with legal interest from date, and P in California ratifies A's act on May 1, the obligation will bind P from April 1, and the rate of interest will be the Illinois rate. In other words, when P ratifies his quasi agent's act it becomes valid from the date of A's doing of it rather than from the time of P's ratification, and by the better authority it becomes valid as to the place of A's act also (15). A valid ratification puts A's act on the same footing as if the original unauthorized act had been itself valid at the time of his doing it. So the rights of each party are what they would have been if P had given A authority to do the act in question prior to his doing it.

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(15) Dord v. Bonnaffee, 6 La. Ann. 563.

§ 20. **Ratification is irrevocable.** An important corollary of the above doctrine is that a valid ratification once made cannot be withdrawn by the principal. Thus the charterer of a ship who, on having all the facts of the transaction laid before him, had approved a previously unauthorized act of his London agent in insuring his cargo with a foreign company, was not allowed when this company defaulted payment on the policy to retract his approval in order to hold the agent liable for failure to insure (16).

§ 21. **Conditions of valid ratification.** It is obvious that the right of ratifying is a valuable privilege. The principal may examine the contract made by his professed agent, and, if it is likely to prove profitable, ratify; and if unprofitable, reject it. Such a privilege should be carefully limited in its scope, and permitted only under conditions where it will not work substantial injustice. Hence there is a considerable body of doctrine as to the conditions essential to a valid ratification.

§ 22. **Act must be performed for existing principal.** The principal who ratifies must have been a person in existence and capable of being ascertained at the time the agent made the contract. Frequently the promoters of a projected corporation do acts and make contracts in the name of the corporation prior to its organization. Such contracts cannot later be ratified by the company. In the case of Kelner v. Baxter (17), A, a promoter, made a contract on behalf of the P. Hotel Co. which he was seek-

(16) Smith v. Cologan, 2 T. R. 188, n (a).

(17) Kelner v. Baxter, L. R. 2 C. P. 174.

ing to incorporate. The P. Co. when organized attempted by a directors' resolution to ratify this contract and thus relieve A of personal responsibility. But in a suit by the wine merchant T against A, who was solvent at the time of the suit while the P. Co. had become insolvent, it was held that the company's attempted ratification was invalid since the company was not in existence at the time of the original contract.

§ 23. **Act must be done on behalf of a principal disclosed to third party.** The agent cannot make a contract on the chance that someone not in his contemplation at the time may step in and take it over. Such a person's attempt at ratification would be invalid. Moreover the agent cannot make a contract in his own name and obligate himself to a third party, and then, without the consent of the third party, assign it to someone who will profess to ratify it as principal. He cannot show that he had this principal in mind if he does not disclose at least the fact that he is acting as an agent. As was said in such a case, it is immaterial that he intended the contract on behalf of this undisclosed principal if he "at the same time keeps his intention locked up in his own breast." "Unless the contract made by the unauthorized agent purports to have been entered into on behalf of another . . . . then that contract was not capable of being ratified by a stranger to it. . . . . There must be some special relation between the ratifier and the contract other than and antecedent to his claiming the contract. . . . . There is as it seems to me no room for ratification (unless all the world may ratify) until the credit of another than

the agent has been pledged to the third party'' (18).

§ 24. **The principal must be competent to do the act.** If the agent enters into a contract on behalf of a principal who could not make it, whether because of incapacity on his part, as in the case of infants where their contracts are held void, or because the contract is itself illegal and therefore void, the principal cannot ratify it. An instance of the latter case is afforded by Milford v. The Milford Water Co. A borough council, a majority of which was composed of men who also were directors of a water company, made a contract on behalf of the borough with the water company, in violation of an ordinance prohibiting contracts in which councillors had an interest that might be adverse to the borough's. At a later time when no member of the council was interested in the water the council passed and paid bills of the company against the borough. It was urged that this was a ratification of the contract, but the court held that the contract was incapable of ratification on account of its illegality (19). A principal may, however, adopt the wrongful act of his quasi agent so as to make himself civilly responsible therefor. Thus if the agent, in the course of the transaction which the principal ratifies, commits a tort, the ratification will impose liability on the principal for the tort (20). But the law will not allow the ratification of criminal acts so as to free the perpetrator from their legal consequences of liability to prosecution. Thus in the case

(18) Keighley v. Durant, (1901) A. C. 240.

(19) Milford Borough v. Milford Water Co., 124 Pa. St. 610.

(20) See § 27, below.

of a forgery of P's name to an instrument by A, an attempt at ratification by P would not deprive the state of its right to punish A; and in some jurisdictions it will not be binding on P if he chooses later to repudiate it, unless in consequence of it some innocent third party has taken the instrument for value, relying on P's acknowledgment of the signature. Here P is said to be estopped to deny his liability, but where there is no such estoppel against P the better opinion is that P is not bound by his acknowledgment of the signature. It is not a ratification, for the forger obviously did not profess to be acting as agent (21). Many courts, however, hold that if P, with full knowledge of the circumstances and intent to be bound, does acknowledge his signature, he cannot later withdraw his acknowledgment (22).

§ 25. **Intervening rights of strangers must be respected.** Where, prior to the attempt at ratification, parties unconnected with the original transaction between the quasi agent and the third party have in good faith obtained rights in the subject matter of the transaction, the principal can no longer ratify. Thus where an unauthorized agent had contracted to sell to T a ranch belonging to P, but before P learned of this he himself had transferred his title to another party, F, P could not then ratify A's contract and so escape from his own transaction with F (23).

§ 26. **Intervening rights of third parties must be re-**

(21) Henry v. Heeb, 114 Ind. 275; see § 23, above.

(22) Greenfield Bank v. Crafts, 4 Allen 447.

(23) McDonald v. McCoy, 121 Cal. 55.

spected. A without authority gave T, a tenant of P's, six months' notice to quit. T declined to act on the notice without further assurance of A's right to serve him with it. P when told of A's act approved it, and six months after A's service of notice brought an action of ejectment against T. It was held that the ratification was invalid, since T had a right to be assured at the very time at which he was called on to act and prepare to leave that the principal might not disavow the agent's notice afterwards, and claim T still as his tenant. "The tenant was entitled to such notice as he could act on with certainty at the time it was given, and he was not bound to submit himself to the hazard whether the third co-executor [i. e. P] chose to ratify the act of his companions or not before six months elapsed" (24). So also if by agreement between the third party and the quasi agent, with whom the third party thinks he has contracted, the contract is cancelled, the principal cannot subsequently ratify (25). And in America generally, the third party with whom the quasi agent has contracted may withdraw if, on finding out that the agent had no authority, he communicates his intention to withdraw to the agent or the principal before the principal has ratified (26).

§ 27. **Transaction cannot be ratified in part only.** A principal cannot ratify as to what will benefit him, and repudiate as to the rest. He must take the burdens of his

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(24) Right v. Cuthell, 5 East 491.

(25) Walter v. James, L. R. 6 Ex. 124.

(26) Dodge v. Hopkins, 14 Wis. 630; Andrews v. Ætna Co., 92 N. Y. 596, contra.

quasi agent's act with the benefits. In the case of Dempsey v. Chambers (27), A without authorization from P sold and delivered to T a load of coal from P's coal yard. In delivering it he negligently broke T's cellar window. P with knowledge of these facts sent T a bill for the coal delivered. By thus ratifying A's act he became liable for damages for the broken window. The court said: "It has never been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command, so far as to make him answerable. . . . . The ratification was not directed specifically to [A's] trespass, and that act was not for the defendant's benefit if taken by itself; but it was so connected with [A's] employment that the defendant would have been liable as master if [A] really had been his servant when delivering the coal."

§ 28. **Ratification must be with full knowledge of facts.** Even the principal himself needs some protection from too sweeping an application of the doctrine of ratification. The assent he gives to the quasi agent's act must be a real one, with knowledge of all the facts pertinent to the transaction, or at least with a willingness to waive further inquiry (28). If through ignorance of essential details of the transaction, due either to a mistake on the principal's part or to fraud on the part of others, the principal gives an assent which is not an intelligent one, his apparent ratification does not bind him. Thus when P approved an agent's distraint on a debtor, in the reasonable

(27) 154 Mass. 330.

(28) Lewis v. Read, 13 M. & W. 834.

belief that he had taken certain property from a certain specified field, he was held not to have bound himself by the approval when it appeared that the property had been obtained elsewhere (28).

§ 29. Ratification may be expressed or implied. In general any manifestation, whether by express words or conduct, of the principal's intention to approve the agent's act is sufficient to constitute ratification. But if a prior appointment to do the act the agent has done would have had to be in writing or under seal, or executed with any special formality, this formality should be followed in ratifying it. Apart from the formal and express methods of ratification, the question whether or not the principal has ratified is a question of evidence. Even where the principal had no express intent to ratify, if his conduct reasonably interpreted has led another person to believe that the act of the quasi agent was done by his authority, he will not be heard to deny that it was so done. A common method of ratifying an act is by accepting the benefits of it. If P receives and sells goods which A without authority bought for him, or if he accepts without objection rents accruing under a lease which A made without authority, his conduct would amount to a ratification (29). Even silence under some circumstances may be a proof of ratification. In Philadelphia etc. Ry. Co. v. Cowell (30) P sued the T Ry. to recover certain dividends. The railway's defense was that these had been applied to

(29) McDowell v. McKenzie, 65 Ga. 630; Burkhard v. Mitchell, 16 Colo. 376.

(30) 28 Pa. 329.

the payment of an authorized additional subscription for stock. The subscription had been made by A, who had immediately informed P of what he had done. P made no reply, did not demand the dividends for seven years, and then sued for them. A was a director of the railway, and had often been consulted by P's American friends with reference to P's interests in the road. The court in deciding that these facts should be admitted in evidence, said: "When the plaintiff was fully informed that a sagacious financier, to whom his chosen friends and correspondents had referred his interests, and who stood in the fiduciary relation of a director, had pledged him for a new subscription, which circumstances seemed to justify and demand, I say, not that he was bound by it, nor even that he was bound to repudiate it, but that his delay for nearly seven years either to approve or repudiate, was a fact fit to be considered by a jury on the question of ratification."

Section 4. Formation of Quasi Agencies by Operation of Law.

§ 30. **In general.** In cases of agency by prior appointment or subsequent ratification the basis on which the agency arises is the will of the parties involved in the relation. But in some special cases similar responsibilities to those arising from real agencies are imposed by law on a principal for the protection of third parties. This has led to the inclusion of two classes of relationships—the so-called agency by estoppel and agency by necessity

—with real agencies, which properly speaking are always representations voluntarily created.

§ 31. **Agency by estoppel.** If the conduct or words of P lead a third party, T, reasonably to believe that A is P's agent, to the extent that T changes his legal position to his detriment in reliance on this belief, P is held to be a principal and A his agent for the transaction entered into between A and T. Thus where P, P's father, and T were standing by a field belonging to T, and the father proposed to T that he let P have the field on a lease, to which T agreed, P, who had stood silent and without disclaimer through all the negotiations, was held bound by the contract as if his father had been his agent, though in fact he had not authorized it (31). Strictly speaking there was no agency here, but the person on whose conduct a third party had relied was liable just as if there had been. The liability is imposed on him without his consent by the law, for the protection of the third party.

§ 32. **Agency by necessity.** Other involuntary liabilities similarly imposed constitute a group usually called agencies by necessity. A husband is bound to support his wife; if therefore he wrongfully neglects or refuses to provide her with necessaries, she may still pledge his credit for the means of subsistence, even though he has forbidden her to do so or has forbidden third parties to furnish her. See the article on Quasi-Contracts, § 58, elsewhere in this volume. So also under certain circumstances of necessity a carrier of goods or a master of a

(31) James v. Russell, 92 N. C. 194.

ship may pledge his employer's credit in the carrying on of his principal's business and for his principal's interest (32).

Section 5. Form of Appointment.

§ 33. In general parol appointment sufficient. An agent may be appointed by an informal agreement either oral or written—technically, an appointment by parol—unless there is some statutory provision requiring a special form of appointment, or unless the authority given is to do an act which must be done under seal, as for example in many states a deed for the conveyance of land.

§ 34. Exceptions: Statutes. Sealed instruments. In some few states a statute of frauds provides that if any contract required by statute to be in writing and signed by the party to be charged, or his agent, is in fact signed by an agent, the appointment of this agent must be in writing. Statutes in some states provide generally that an agent to make certain kinds of contracts—for example for the purchase or sale of lands—must be appointed in writing.

At common law, authority under seal is necessary to enable an agent to make a contract under seal binding on his principal. The commonest examples of instruments under seal are deeds of conveyance and bonds. The rule applies at common law even to the filling in of any material blanks in such instruments, for example the blank left in a deed for the name of the transferee of land. One

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(32) McCready v. Thorn, 51 N. Y. 454.

important exception to the rule is that in the case of the execution of sealed instruments by an agent of a corporation his authority need not be conferred under seal. In many states the requirement of a seal has been abolished by statute, and of course here the rule has no relevance. Where, however, a seal is still required, although various relaxations of the rigidity of the common law rule have been introduced, safety lies in the appointment under seal of an agent to execute an instrument under seal.

CHAPTER III.

TERMINATION OF THE RELATION.

§ 35. **In general.** Agencies may be terminated by the consent of both parties, by the sole will of either party, or by the operation of law.

§ 36. **Termination by consent of principal and agent.** When a man appoints an agent, the appointment is ordinarily for some fixed period or definite purpose, and when the time set has expired, or some agreed date has been reached, or when the purpose of the agency has been accomplished, the agency comes to an end. P hires his clerk for a year; he takes on extra help in his store until stock-taking is over; he secures the services of an attorney to sue a debtor. When the year is over, or when the stock-taking has been completed, or when the attorney has carried a suit to judgment, the agency by the terms of the original agreement comes to an end. Often, however, the parties fail to fix definitely the time at which the employment is to terminate. In such cases resort may be had to the surrounding circumstances, or an interpretation of the language of the agreement, to determine the intention of the parties. Thus where A was employed as attorney of the P Co. under an agreement that he was to act "from the first of June next at £100 per annum," this was held to be a contract employing A for at least one year (1). The

(1) Emmons v. Elderton, 13 C. B. 495.

intention of the parties governs. Even when there is no previous agreement as to the period during which the relation is to continue, or when there is some agreement from which the parties desire to be released, if both are desirous of putting an end to the relation, a subsequent agreement, if it has the elements of a valid contract, may at any time terminate the agency.

§ 37. **Revocation by the principal.** The authority of the agent is conferred by the principal, to be exercised at his direction and for his ends. If therefore the principal wishes to discontinue the relation for any reason, he is allowed to do so, unless there are special circumstances giving the agent power to exercise the authority conferred upon him even against the principal's wishes. The principal may wish to abandon the enterprise in which the agent represents him, because it is unprofitable or troublesome, or for any or no reason. In the case of Brown v. Pforr (2) A, a real estate agent, sued on a contract made with him by P, by which P agreed to pay A $750 if A would find within one month a buyer for P's land at $75,000. Within the month A had found a purchaser, but before this P had notified him that the agency was revoked. It was held that P was not liable to A. As the court remarked: "The rule that in this class the principal may revoke at any time before *complete* performance by the broker unless he has expressly otherwise agreed may be a harsh rule, but, if it is, it would seem a very easy matter for the broker to protect himself against it."

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(2) Brown v. Pforr, 38 Cal. 550.

§ 38. **Rights of the agent on revocation.** The opinion above suggests a limitation on the power of the principal to revoke. If the agent has a contract of employment fixing a definite time for the termination of the agency, this amounts to an agreement on the principal's part not to exercise his power to revoke the agent's authority. He may still do so, but if he does so in unexcused breach of the contract, he renders himself liable to the agent in damages. The authority may be withdrawn, but the contract cannot be broken without this liability. Moreover even when there is no violation of contract the agent is entitled upon revocation to reimbursement and compensation for work done while the relation existed. "If he expended money, time, or labor, or all upon the business entrusted to him, the power of attorney itself was a request to do so, and on a revocation would leave the principal liable to him on his implied assumpsit" (3).

§ 39. **When revocation is justified.** Even if in the contract of agency the principal has bound himself not to revoke, or has agreed to employ the agent for a fixed period, he still may without warning and without liability dismiss the agent if the agent does not keep his part of the contract. On the agent's side of the contract it is an implied term that he possesses and will exercise the required skill and care necessary to a proper discharge of his duties, and that he will be loyal to his employer's interests. If then for any reason he becomes incapable, or if he misconducts himself in any way likely to prove injurious to the

(3) Blackstone v. Buttermore, 53 Pa. 266.

interests of his principal, the principal may discharge him. Thus where A, employed by the year by P to manage P's woodyard, went into the wood business in the same town within the year and P dismissed him on this account, P was upheld by the court when A sued him for a year's wages (4).

§ 40. **What constitutes a revocation.** A principal may revoke his agent's appointment in express words, or a revocation may be implied. In the absence of statute no particular formality need be observed in revoking even an authority under seal. The acts which will be held to constitute a revocation are various, and a few examples must serve. If the agent is given property to sell, but prior to his doing it the principal himself disposes of the property, the agent's authority is thereby revoked (5). So also if the principal appoints a second agent to do the same act as he had formerly given a first agent exclusive authority to do, the second appointment revokes the first (6). But if the first be not exclusive, and the second not inconsistent with it, a second agent does not revoke the first appointment. For example, P may list his house for sale with several real estate brokers, and all will be agents alike. The sale by one agent, however, will revoke the authority of all the others, as the principal has thereby disposed of the subject matter of the agency (7).

§ 41. **Necessity of notice of revocation.** Notice of re-

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(4) Dieringer v. Meyer, 42 Wis. 311.
(5) Gilbert v. Holmes, 64 Ill. 548.
(6) Johnson v. Youngs, 82 Wis. 107.
(7) Ahern v. Baker, 34 Minn. 98.

vocation is in general necessary to make it binding on the agent and the third party. In Robertson v. Cloud (8) P had appointed A an agent to sell a plantation, and had subsequently sent A a letter revoking the agency. But the letter, though it was mailed before A found a buyer, did not reach him until after the contract was made. It was held that the agency was good until A got his notice, and so the agent was allowed to recover his commission on the transaction.

As to parties who have dealt with the agent while he still had authority, the same rule obtains. An insurance company had appointed one A its general agent, and T paid him premiums on a policy during the time of his agency and after it was revoked by the company because of A's having accepted the agency for another company. No notice was sent by the company to T that A was no longer its agent. It was held that the company was bound by A's receipt for T's premium payment; for, as the court said: "No company can be allowed to hold out another as its agent and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely on the continuance of his authority until in some way informed of its revocation" (9). Thus notice should be brought home to all those to whom the principal has held out the agent as having authority. They are entitled to such notice as would serve to put a reasonably prudent man on inquiry. Actual notice should be given to all who

(8) Robertson v. Cloud, 47 Miss. 208.

(9) Insurance Co. v. McCain, 96 U. S. 84.

have extended credit to the agent in reliance on his authority, and general public notice to others (10).

§ 42. **Renunciation by the agent.** Just as a principal has power to dismiss his agent at will, so also an agent can leave his employment at will. Practically the same rules govern renunciation by an agent as govern revocation by a principal. If an agent quits his task when he has agreed to work for a definite time he makes himself liable for a breach of contract unless the principal has broken his side of the agreement. If he thus renounces his employment before his contract expires, he cannot in most cases recover any compensation for the work he has actually done; but some jurisdictions allow him the reasonable value of his services to his principal, less the loss the principal has suffered by his breach of the contract to remain. A renunciation need not be in express words; for example a mere abandonment of the work by the agent may be taken by his principal as an indication of an intention to renounce the agency. Notice of the renunciation must reach the principal to make it effective between him and his agent, and the principal must give notice to third parties in order to protect himself from further contracts being made by the agent. For example, the P Insurance Co. appointed A their Massachusetts general agent, and filed as required by law his power of attorney with the secretary of state in December, 1850. In February, 1851, A sent in his resignation, and it was accepted to take effect April 1; but no notice was sent the

(10) Claflin v. Lenheim, 66 N. Y. 301.

secretary of state. On April 2 a Massachusetts creditor of the company served process on A as agent of the company, and he accepted process, avowing his agency. Judgment was duly recovered against the company, the court holding that as to third parties renunciation was inoperative until notice was given them (11).

§ 43. **Termination by operation of law: Change in the subject matter.** The law discharges the contract of agency as it does other contracts, on grounds of public policy or necessity, even though it may be that both principal and agent wish to continue the relation. For example, if the law makes the act for which the agency was created illegal, though it was legal when the agency was created the relation of agency will be thereby terminated. So if A had been appointed bartender in a city which enacted a prohibitory law, A's employment would cease by operation of law. So also if without voluntary act of either principal or agent the subject matter, the continued existence of which was contemplated when the agency was created, is destroyed or permanently altered, the agency will be terminated. Thus where A agreed to manufacture cheese from milk furnished by P at A's factory, when fire destroyed the factory, A was thereby released from his contract of agency. The court interpreted the contract as contemplating the manufacture from milk furnished by P at this particular factory only (12).

§ 44. **Same: Death of a party or dissolution of a cor-**

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(11) Capen v. Insurance Co., 1 Dutcher (N. J.) 67.

(12) Stewart v. Stone, 127 N. Y. 500, and see the article on Contracts, § 188, earlier in this volume.

poration or partnership. The death of either party terminates a mere agency. After the death of the principal, acts done by the agent are not binding on the principal's heirs or representatives. Nor can these parties compel the agent to continue his employment. So where A contracted to work for P for a year as a farm hand, and P died at the end of four months, but A went on working and sued P's estate for subsequently rendered services, it was held that the estate was not liable. The court said: "The master's habits, character, and temper enter into the consideration of the servant when he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract, are personal upon both sides" (13). The same rule applies in the case of the death of the agent. Money due him, for example, on goods sold for his principal should therefore be paid to the principal, and not to the agent's administrators (14). The dissolution of a corporation or partnership terminates an agency in which the association was either principal or agent (15), but does not necessarily free it from liability on the agency contract. The harshness of the common law rule that the death of the principal immediately and without notice puts an end to his agent's authority has led to the enactment of statutes in several states making valid the acts of agents done after a principal's death, if done in bona fide ignorance of that fact.

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(13) Lacy v. Getman, 119 N. Y. 109.
(14) Merrick's Estate, 8 Watts & S. 402.
(15) People v. Globe Ins. Co., 91 N. Y. 174.

§ 45. Same: Various changes of condition of one of the parties. If after the relation is formed either principal or agent becomes insane, this occurrence terminates the agency unless the party who deals with the agent was ignorant of the insanity and acted in good faith. In such a case the contract with the third party is binding on the principal although as to the agent the agency was at an end (16). But a judicial declaration of the party's insanity will be notice to all the world of that fact. If either party becomes bankrupt, since the bankruptcy divests him of all control over his property, the relation of agency will thereby be terminated as to all rights affected by the bankruptcy. The illness of the agent, if it incapacitates him from performing his duties, puts an end to the agency; but the illness of the principal will not usually have such an effect. If the marriage of the principal affect his rights in the subject matter of the agency, such agency will be terminated. For example, where marriage gave P's wife an interest in land which P owned, and which he had given A a power of attorney to sell, the marriage was held to nullify A's power of attorney (17).

§ 46. Irrevocable agencies: Powers granted for the protection of the agent. Mere agencies, as we have seen, are revocable by the will of the principal or by certain changes in his condition. But where the agency is in legal phrase "coupled with an interest" in the subject matter of the agency, then it cannot be thus terminated.

(16) Drew v. Nunn, 4 Q. B. D. 661.

(17) Henderson v. Ford, 46 Tex. 627.

If an agent who has such an interest himself were to be dismissed he would lose more than merely his employment and his commissions. He would lose either a security he has been given for his protection as creditor of the principal, or a property right in the subject matter of the agency itself. Wherever a principal has conferred on an agent his authority as a security for some debt owed by the principal to the agent, the authority is irrevocable, at least by the principal himself. Thus in the case of The Pacific Coast Co. v. Anderson Co. (18), P chartered a vessel from A at a monthly hire, agreeing to pay all expenses of navigation and to give a bond to secure the fulfilment of the contract. He then subchartered the vessel for the carriage of coal at a stipulated freight. In lieu of the bond he had contracted to give, he gave A a power of attorney to collect all such freights as should become due to P under the subcharter, and to apply them to the vessel's hire. It was held that this power of attorney, having been given for a valuable consideration and as a security for the payment of money, was irrevocable by P.

§ 47. **Same: Powers coupled with an estate.** Some courts hold that such a power is not revoked even by the death of the principal, but in America generally a distinction is made between power of attorney irrevocable during the life of the principal (inter vivos), of which the case just cited is an example, and powers irrevocable even by death. The latter must be powers coupled with an interest in a stricter sense than is a power given to

(18) Pacific Coast Co. v. Anderson Co., 107 Fed. Rep. 973.

secure a debt by control over the proceeds of the exercise of the power. By power coupled with an interest these courts mean a power coupled with a property interest in the subject matter of the agency itself—an actual estate in the thing the agent has been authorized to deal with. Such a power is irrevocable even by the death of the principal or agent, or any change of condition, such as insanity, bankruptcy, or marriage. In the case of Norton v. Whitehead (19), P, a contractor, had borrowed from A, his foreman, various sums to enable him to carry out a contract. Later he executed to A an assignment of all moneys due or to become due . . . "for any work I may perform, . . . the assignment to remain good until all notes due or which are to become due . . . from me are paid." Still later P gave A a power of attorney authorizing him to collect all moneys due or to become due to P by reason of his performance of the contract he was engaged on. P died, and the work was finished by his administrator, who collected the moneys due, claiming that A's power of attorney was nullified by P's death. In a suit by A it was held that his power was one coupled with an interest in the subject matter of the agency. This subject matter, the court said, was "all moneys that were to become due" to P by reason of his performance of the contract. Such a power, it was held, was not revoked even by death, and so A was entitled as against the administrator to the payments under the contract.

(19) Norton v. Whitehead, 84 Cal. 263.

CHAPTER IV.

OBLIGATIONS OF PRINCIPAL TO AGENT.

Section 1. Obligation to Recompense.

§ 48. **Compensation.** Ordinarily an agent's pay is fixed by his contract of agency, but if none has been agreed on and there are no circumstances negating the obligation of the principal to pay it, the principal must pay the agent what his services are reasonably worth. If the agency has been created by ratification the same obligation is imposed on the principal. Failure to pay the agent his wages or salary makes the principal liable for breach of contract. If a principal wrongfully discharges an agent, the agent may recover his entire stipulated commission less whatever he would have been able to earn at a similar occupation during the unexpired term of his contract with the principal, if by reasonable diligence he could have secured such similar employment. If the agency is revoked by operation of law, or by the exercise of the principal's power to revoke an appointment not made for a definite period—an agency at will, as it is sometimes called—the agent is entitled to compensation measured by the reasonable value of the benefits conferred on the principal. If the agent renounces his employment before its contract term he can, in most states, recover nothing, but some states allow recovery

on quasi-contractual grounds. If his employment was one at will the agent may recover for services already rendered. An agent who has violated his duties to his principal (see Chapter V below) cannot recover compensation (1).

§ 49. **Reimbursement.** For all expenses which the agent has necessarily incurred in the discharge of his duties as agent, on behalf of the principal, the agent is entitled to reimbursement from the principal. Thus a commission merchant was allowed to recover the expenses of an insurance adjustment he had procured, in good faith, to protect his employer's interests, after fire had damaged the latter's goods; and this was allowed even though it was shown that other persons than the adjuster he procured would have done the work more cheaply (2). The agent's outlay, must not, however, be for an illegal end. For instance, in jurisdictions where gambling contracts are declared illegal by statute, an agent who knowingly pays out money for his principal on a wager is not entitled to reimbursement (3). Nor can the agent recover for unnecessary expenses or outlays caused by his own fault or neglect. Thus where an agent appointed to buy some property and make the necessary transfers of title accepted a transfer made out to one "Arthur R." instead of "Alexander S. R.," as the name should have read, and then paid solicitors to secure a correction of

(1) The doctrines of compensation are purely matters of contract or quasi contract. For fuller discussion the reader is referred to the articles on these subjects earlier in this volume.

(2) Wertheimer v. Talcott, 103 N. Y. Supp. 692.

(3) Tatam v. Reeve, (1893) 1 Q. B. 44.

the mistake and a good conveyance, it was held that he could not recover from the principal the expenses consequent upon his blunder (4).

§ 50. **Indemnity.** If in the due execution of his agency the agent suffers loss or damage he is entitled to indemnity from his principal, except where he has with knowledge or the duty of knowledge engaged in an illegal task. In other words, if an agent is an innocent party to a wrong directed by his principal, he may recover from the principal for any damages he is compelled to pay to the injured party. In Adamson v. Jarvis (5), A, an auctioneer, having received orders from P to sell cattle which P stated to be his own, executed the order in good faith. He was then sued by T, who was the rightful owner of the cattle, for the conversion of the animals, and compelled to pay damages and expend money in lawyers' fees and other expenses of the suit. All of these outlays he was allowed to recover from P. Of course if A had known at the time of the sale that the cattle did not belong to P, he could have recovered nothing.

Section 2. Obligation to Protect.

§ 51. **Protection from injury: In general.** The master (6) is bound to use reasonable care to prevent his servant from being injured in the course of his employment. If

(4) Bailey v. Burgess, 48 N. J. Eq. 411.

(5) Adamson v. Jarvis, 4 Bing. 66.

(6) As the duty of protection arises most frequently in that form of agency relation known as master and servant, the words master and servant will be used throughout this section, the parties in the illustrative examples being indicated respectively by the letters M and S.

he does not exercise this care, and a servant is injured on account of his failure to do so, he is liable to the servant in damages, unless the injury has arisen from a risk placed by law upon the servant or voluntarily assumed by him; or unless the servant by his own acts or negligence directly contributed to the injury. The master in other words, is not liable for all injuries occurring in the course of the servant's employment, but only for those of which his own neglect of duty is the proximate cause. In a recent case the facts were these: S while working in M's mine was overcome by gas, and then while being taken up from the shaft unconscious had his leg broken, because his foot was allowed to project over the side of the lift. It was held that as the proximate cause of this injury was the negligence of the men who put S on the elevator, the negligence of the master in allowing gas to accumulate in the mine was still not such as to make him liable (7).

§ 52. **Classification of duties.** The duties of the master to protect his servants may be classed as follows: To provide and maintain, by suitable inspection and repair, a safe place to work; safe machinery and appliances to work with; a sufficient force of competent fellow servants; rules and regulations for the service, properly made, promulgated, and enforced; and special instruction, warning, and regulation, provided in cases of particular servants or exceptional situations.

§ 53. **Duty to provide a safe place to work.** The master is bound to use reasonable care and diligence to pro-

(7) Teis v. Mining Co., 158 Fed. 260.

vide his servants with a reasonably safe place to work. If the servant receives injuries through improperly lighted buildings, unsafe floors, dangerous bridges, or other fault in the construction or maintenance of the places where the master sends him to work, the master is responsible and the servant can recover damages from him for the injury (8). But if the place is unsafe merely because of the nature of the work and not through any failure of the master to take reasonable precaution to make it safe, then the master is not liable. A high bridge is obviously not so safe a place to work as a law office, but the risk the servant runs on the bridge he is set at building is due not to the master's neglect but to the very nature of his employment. So also if the dangerous nature of the place is due to its changing character under the work the servants themselves are doing upon it. For instance, where a servant was injured in a gravel pit by a slide from the gravel bank he was digging into, he was not allowed to recover. The court said: "If the nature of the work is such as to produce changes and temporary conditions in the place where the work is performed, the rule does not require the master to keep the place reasonably safe under such changed conditions which the work renders necessary" (9).

§ 54. Duty to provide and maintain safe appliances and machinery. The master owes the duty of using reasonable care to provide and maintain for his servants

(8) Chicago &c. Ry. Co. v. Jackson, 40 Tex. Civ. App. 273; Roundy v. United Box &c. Co., 103 Me. 83.

(9) Village of Montgomery v. Robertson, 229 Ill. 466.

appliances and machinery suitable and safe for their work. Thus a railway company was held liable to an engineer injured by the explosion of the defective boiler of his engine, where the company by its agents had not taken reasonable care to see that he had been provided with a safe locomotive (10). The master is not bound to use the best machinery obtainable nor the latest improvements, but he is bound to use appliances reasonably adapted and safe for the intended purpose and under present day conditions (11). If the servant uses appliances for other than their intended purpose, or does not use the safeguarding apparatus provided him, he cannot recover (12). For example, a lineman who neglects to use his gloves and is injured by a live wire cannot get damages for his injury.

§ 55. **Duty to inspect and repair.** The master must use reasonable care, by proper inspection and repairs, to keep the place where he puts his servants to work and the appliances and machinery which he furnishes them in properly safe condition. Thus where a mason was killed by the fall of a derrick caused by the wearing through of a steel cable supporting it, and it was shown that no inspection was made though the master knew the consequences of wear on the cable and the certainty that such wear was bound to occur, the master was held liable (13). But injuries from such defects as arise in daily opera-

(10) Ford v. Fitchburg Ry., 110 Mass. 240.

(11) McDonald v. Cal. Timber Co., 94 Pac. Rep. 376 (Cal.).

(12) Kauffman v. Maier, 94 Cal. 269; Maitrejean v. Ry. Co., 133 N. C. 746.

(13) Rincicotti v. O'Brien Contracting Co., 77 Conn. 617.

tion of the machinery—defects which require no particular skill to repair, which may be and usually are repaired as a detail of the operation of the machine by the operator himself, with material furnished by the master—do not make the master liable. His duty is fulfilled by an adequate provision of the means of repair. Thus where a water gauge attached to a steam boat boiler was fitted with a glass liable to break at any time, and the operation of replacing the broken glass could be easily performed and a new one put in from a supply ready at hand, the duty of replacing the glass was held incumbent on the engineer in his character as servant, and a failure to remedy a breakage by inspection did not make the employer liable (14). The inspection required must be reasonably frequent, but it is not required to be so frequent or so detailed as seriously to impede the progress of the work. Thus where an inspector was sent around every afternoon to inspect the floor of the sawroom of a paper mill, and "to see that everything was all right," this was held a sufficient discharge of the master's duty of inspection, so as to exonerate him in a case where one of his servants had been injured by being struck by a block of wood which fell through a trapdoor in the sawroom floor, carelessly opened by a workman after the daily inspection. The court said: "The duty of inspection is one which must be enforced in a reasonable manner and . . . . does not require unceasing and impracticable performance" (15).

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(14) Manning v. Steamboat Co., 72 N. Y. Supp. 677.

(15) Peet v. Paper Co., 86 App. Div. (N. Y.) 101.

§ 56. **Duty to provide a sufficient force of competent fellow servants.** The master must use reasonable care to provide his servant with a sufficient force of fellow servants to do with reasonable safety the work the servant is set at. Thus where S, a brakeman on a train of the M Co., was injured in a collision with another train of the same company, and the cause of the collision was an insufficient force of brakemen on the second train, the M Co. was held liable. Nor was it any defence that the company had hired the needed additional brakeman and he had failed to report for duty. The train should not have been started out with an insufficient force (16). The master must also use reasonable care as to their competence in selecting the servants. He is bound to be careful not to employ negligent, unskilled, or otherwise incompetent servants. When a manager of the M Telephone Co., on receiving a report of a broken wire and finding no lineman at hand, sent out a young office man, F, with no experience, to assist a regular lineman, S, and F brought a live wire in contact with S's body so that S was killed, the M Co. was held liable for its breach of duty, through its manager, to provide a competent fellow servant for S (17).

§ 57. **Duty as to rules.** The master is bound to use reasonable care to make, promulgate, and enforce rules and regulations governing the operations of his servants, so as to afford servants obeying them a reasonable protection in the discharge of their duties. In the case of

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(16) Flike v. B. & A. Ry. Co., 53 N. Y. 549.

(17) Scott v. Iowa Telephone Co., 126 Ia. 574.

Abel v. Delaware &c. Ry. Co. (18), a car repairer while under a car on a sidetrack making repairs was killed by an engine backing against the car. No regulation to safeguard men in making repairs on stationary cars had been made by the company, and on this account it was held liable to the representative of the deceased. It is not sufficient to formulate rules; they must also be published, for example by posting them about the premises or otherwise giving servants a reasonable opportunity to learn them (19). The master also must use reasonable diligence in enforcing rules, and if they fall into disuse through his failure to be vigilant in insisting on their observance he is liable if his servant is injured thereby (20).

§ 58. **Duty as to special orders, etc.** In addition to general rules, the master has a duty to use reasonable care to give special orders in special cases or unusual situations (21), and to give instruction and warnings to employes in case the putting of inexperienced or immature workmen at an unfamiliar task, or at any task the risks of which are not patent to them, would lead a reasonable man to consider instruction or cautioning necessary. Thus in the case of L. & N. Ry. Co. v. Miller (22), a switchman who had had, as the yardmaster knew, but five days' experience, and that as a volunteer member of a switching crew, was assigned by this yardmaster to

(18) 103 N. Y. 581.
(19) Strong v. Rutland Ry., 121 App. Div. (N. Y.) 391.
(20) Merrill v. O. S. L. &c. Ry. Co., 29 Utah 264.
(21) Hankins v. N. Y. Ry. Co., 142 N. Y. 416.
(22) 104 Fed. Rep. 124.

a crew without further advice, warning, or instruction. Evidence tended to show that four weeks' experience as learner was requisite to acquaint one with the risks of such a position. The switchman in the exercise of his duties attempted to make a coupling which was new to him, and which could be done safely only in a particular way of which he knew nothing. He was injured and the master was held liable. The court said: "The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from a want of that degree of experience requisite to the cautious and skilful discharge of the duties incident to a dangerous occupation, as when the disqualification is due to youthfulness, feebleness, or general incapacity. If the master has notice of the dangers likely to be encountered, and notice that the servant is inexperienced, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such a servant in respect to the dangers he will encounter, and how best to discharge his duty."

§ 59. **The servant's right to rely upon performance by the master.** In the case of these duties of the master the servant may rely on a performance of them by the master unless he happens to know, as a matter of fact, that the master has not done his duty, or unless a reasonable person in the same circumstances would have observed this. He does not have to make any observation for himself (23).

(23) Silveira v. Iverson, 128 Cal. 187.

§ 60. **Non-delegable character of these duties.** The duties above enumerated, the master is bound to see performed. He may discharge them in person or by deputy, but the delegation of the discharging of the duty to a deputy, even where the master uses the greatest possible care in his selection, does not free the master from responsibility. His duty is to have reasonable care exercised in safeguarding the workmen. If his carefully selected and competent foreman should without warning become incompetent, and neglect to provide, for instance, proper inspection for a workroom, the master is still liable to a servant injured in consequence of this neglect. Reasonable care in selecting a substitute is not equivalent to reasonable care in actually carrying out the duty imposed by law on the master. The master is exonerated in the case of delegated duty only when the delegate does in fact himself exercise reasonable care.

§ 61. **Qualifications of the rule: In general.** The liability of the master is subject to two qualifications. The servant may have voluntarily assumed the risk of injury arising from the master's failure to discharge any of his duties of protection; or he may have contributed to the injury through his own negligence. In either of these cases the master is not liable for the injury arising from his failure to provide the various protections under discussion.

§ 62. **Same: Voluntary assumption of the risk by the servant.** We have seen that the servant may presume, in entering on his employment, that his master has discharged his duty of provision against risks; but if he

does in fact know that the master has not performed these duties, for instance that the premises or machinery are unsafe, and not merely knowing their physical condition but also appreciating the risk this involves, he undertakes the employment, he cannot then recover against the master for any injury received from the non-fulfilment of the master's duties in these regards. His voluntary assumption of the risk is a defence to the master. So also, if after he has begun work he then at any time discovers the master's non-performance of his duty, and yet without complaint and without any promise by the master or his representative that the defect will be remedied, he chooses to go on working, this also will be a defence to the master. A teamster was injured under the following circumstances: He was driving a four-horse lumber wagon which had no seat, and the lines of which were too short for driving four horses. He knew these defects but continued working for several months, until in consequence he was pulled under the horses' hoofs and injured. It was held that he had voluntarily assumed the risk and could not recover (24). If, however, the servant complains of a defect and receives a promise of repair, he may, in reliance on the promise, continue a reasonable time using the defective apparatus or working in the dangerous place, unless the danger is so imminent that no reasonably prudent man would continue to work. In the case of Anderson v. Seropian (25), S was a box-printer, who, after working a defective press,

(24) Lemberg v. Glenwood Lumber Co., 145 Cal. 255.

(25) 147 Cal. 201.

complained to a foreman that he did not like to run it at the speed demanded of him. The foreman said, "Go ahead, and when you get far enough ahead with the material for the box-makers to work on, why then we will fix the machine." S worked on, and that afternoon his hand was mangled in the machine. It was held that he had not assumed the risk. He had complained and had a promise of repair. But if upon complaint the master refuses to repair or makes no promises, remaining at work will be held a voluntary assumption of risk.

§ 63. **Same: What assumption is voluntary.** It is to be noted that the assumption of risk must be voluntary. Hence it must be shown by the master that the servant both knew of the risk and also appreciated its character. It is not enough to know the existence of a defect; the servant must also understand in general the risk its continuance involves. Hence also if the servant is acting under compulsion he does not assume the risk so as to free the master from liability. Thus where a Polish boy, unable to speak or understand English, is pushed by a foreman and frightened into going in between two shaky piles of timber to work, he has not assumed the risk of injury from their falling (26). But in America it is generally held that a mere fear of loss of employment, even if induced by a threat of discharge unless S works under the additional risk, is not sufficient to constitute coercion. Thus in the case of Lamson v. Axe Co. (27), S, a painter of hatchets, complained of a new

(26) Wells & Co. v. Gortorski, 50 Ill. App. 445.
(27) 177 Mass. 144.

rack for the fresh-painted hatchets as more dangerous than the old, because the hatchets were likely to fall on him. He was told to use the rack or leave. He stayed, and the accident he feared happened. When he sued the master he was held to have assumed the risk. The court said: "The plaintiff appreciated the danger more than anyone else. He complained and was notified that he could go if he would not face the chance. He stayed and took the risk. He did so none the less that the fear of losing his place was one of his motives."

§ 64. **Same: Contributory negligence of the servant.** A servant cannot recover for injuries to which he has contributed directly by his own fault. He is bound to use reasonable care to protect himself from injury. If he does not, and his lack of care has been a proximate cause contributing to the injury, he cannot recover. Thus where a servant stepped without looking into a well lighted elevator shaft, even though the door, which should have been kept shut, had been left open through another servant's carelessness, his own negligence so contributed to the accident that he could not recover for injuries from his fall (28). For what constitutes contributory negligence see the article on Torts, §§ 191-200, in Volume II of this work.

Section 3. Exception to Obligation to Protect: Fellow Servant Rule.

§ 65. **The nature of the fellow servant rule.** The master is not bound to protect the servant from all risks in-

(28) Leahy v. U. S. Cotton Co., 28 R. I. 252.

cident to his employment. In the absence of statute the burdens of these risks are divided between the master and the servant. On the servant the law imposes the risks ordinarily incident to an employment of a given nature: the danger from wind and ice connected with bridge building; electric shock or breaking rope or wire incident to a telephone lineman's work; and the similar hazards arising out of the very nature of any particular employment. In addition to these, the common law requires the servant rather than the master to assume the risk of injury from the negligence or wilful misdeed of a fellow servant. He has of course a right of action against the wrong-doer himself, but not against the master as he might have in case he were not himself in the master's employ. As we shall see later (Chapter VI) a master is ordinarily liable to a person injured by his servant, if the injury is inflicted by the servant in the course of his employment and with an intention of serving the master. But if the injured person is a fellow servant of the wrong-doer, the master is not liable to him. This is what is known as the fellow servant rule. It is an exception to the ordinary rule of agency which imposes liability on the master for the misdeeds of his servant in conducting his business. The fellow servant rule places this risk of injuries from a fellow servant, with the risks incident to the nature of the business, on the shoulders of the servant; always, however, leaving him his remedy for the injury against the actual wrong-doer, the fellow servant who inflicted the injury. Thus where an engineer was injured by reason of the negligence of a

switchman who so managed his switch as to derail the engineer's train, the engineer was not allowed to recover from the railway, because the injury was inflicted by his fellow servant, the switchman (29).

§ 66. **Limitations on the fellow servant rule: Master liable if participating in the injury.** It has been observed that the actual wrong-doer is liable to the injured servant. The master owes the servant a duty not to injure him by his own negligence or wilful wrong. Even if he works side by side with the servant, he does not thereby become a fellow servant so as to free himself from liability under the fellow servant rule (30). So also if the injury resulted from the master's negligence or wrong combined with that of a fellow servant, both contributing to the injury. Thus where a fireman was killed by the derailing of his engine while it was running backward at high speed, and the evidence showed that the accident would not have happened but for the defective condition of the track, though the excessive speed at which the engineer ran was a contributing cause, the fireman's estate recovered from the master for his failure to use reasonable care to provide a safe place to work (31).

§ 67. **Same: Master liable for a vice-principal's wrong.** As we have seen, although a master may delegate his discharge of the duties of protection he owes his servant to another, he does not therefore relieve himself of responsibility for their proper discharge. If the person

(29) Farwell v. Boston & Worcester Ry., 4 Metc. 49.
(30) Ashworth v. Stanwix, 3 El. & El. 701.
(31) Shugart v. Atlantic Ry. Co., 133 Fed. Rep. 505.

to whom he delegates them is a fellow servant of the one injured through their negligent discharge, his function as vice-principal, acting in the place of his master, takes him out of the fellow servant class. He is for the time being a representative of the master rather than a fellow servant of the servant whom he injures. His vice-principalship depends not on his relative rank among his master's servants, but on the character of his duties as representative. A man may be both a fellow servant and a vice-principal, depending on the task he is upon at a given time. Thus in the leading case of Crispin v. Babbitt (32), a general superintendent of M's iron works negligently turned on steam in one of the shops and started a wheel on which S was at the time working. This was an operative act rather than a discharge of one of the master's personal duties, so that the general superintendent was for the time being a fellow servant of the injured servant, and the master was therefore not liable. On the other hand, a servant in a very subordinate position may yet act as a vice-principal. So servants employed in digging a trench for a conduit later to be put in by S were held not to be S's fellow servants, but to be performing the master's duty of providing a safe place (33). So also servants supplying machinery or appliances, or carrying on inspection or making repairs, are vice-principals.

§ 68. **The superior servant doctrine.** A number of

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(32) 81 N. Y. 516. But see Cody v. Langyear, 103 Minn. 116.

(33) Eichholz v. Mfg. Co., 73 N. Y. Supp. 842.

jurisdictions determine the applicability of the fellow servant rule not by the nature of the task the servant is performing, but by the grade or rank of the servant causing the injury to his fellow servant. This is called the "superior servant" doctrine, and in its most sweeping form may be stated thus: Where one servant is placed in control over another servant, and the subordinate is injured by the superior servant in the course of the employment, the master is liable for such injury. Some states hold this doctrine only to the extent that the master will be liable for injuries resulting from the negligence of the superior servant in exercising the control over the subordinate given him by his master. Some additional states, though repudiating the rule generally, hold that the general manager of a business or of a distinct department of a business is a vice-principal by virtue of his position. So the general superintendent of a gas light company, and even the manager of a grain elevator, have been held vice-principals by virtue of their position (34).

§ 69. **The different department doctrine.** Another variation from the rule of the master's non-liability is the different department exception. It may be stated thus: If the injured servant is in a different department of the master's general business from the servant who causes the injury, the master is liable, as such servants are not fellow servants. Thus, in a leading Illinois case, a laborer in a railway carpenter shop was crossing the tracks of the railway, and was struck by a negligently driven

(34) Zentner v. Gas Co., 126 Wis. 196; Meier v. Way. 136 Iowa, 302.

locomotive. The railway was not allowed to avail itself of the fellow servant rule. The court said the reason of the rule "does not, nor can it, apply where one servant is employed in a separate and disconnected branch of the business from that of another servant. A person employed in a carpenter shop cannot be required to know of the negligence of those entrusted with running trains or handling engines on the road" (35).

§ 70. **Who are fellow servants: In general.** It is generally agreed that in order to be considered fellow servants servants must be in the employ of the same master and in a common employment. As we have just seen, some courts hold that if servants are in distinct departments of a common employment they are not fellow servants, and some courts hold that if the negligent servant is the superior of the injured servant they are not fellow servants, within the meaning of the fellow servant rule. All courts agree that if the negligent servant is, at the time he commits the wrong which results in the injury complained of, engaged as the master's representative in discharging any of the personal duties which the master owes his servants, he is not within the fellow servant rule.

§ 71. **Same: Servants having a common master.** Persons are not fellow servants unless they are servants of the same master, even though their employment brings them into contact with each other. Thus in the case of Swanson v. North Eastern Ry. Co. (36), S, a signalman hired by the Great Northern Ry. and wearing its

(35) Ryan v. C. & N. W. Ry., 60 Ill. 171.
(36) 3 Ex. D. 341.

uniform, was employed as a member of a joint station staff to signal trains for the Great Northern and the North Eastern Ry. Co., the other occupier of the station. He was injured by the negligent backing of a North Eastern train upon him while he was at work. He was held not to be a fellow servant of the negligent engineer. Thus also servants of a master and an independent contractor, though working side by side in a common employment, are not fellow servants since not under a common control. So the servant of a teamster working on a wagon along with the servants of a steel mill in getting steel plates properly adjusted on the wagon, is not their fellow servant, for he is not under the same control (37). If, however, S, the servant of M, is transferred to the service of N with S's knowledge and consent, after he has entered on his new employment he becomes a fellow servant of N's servants. Thus, in a leading English case, a colliery company had placed a hoisting engine with its engineer L under the control of one W, a contractor who was sinking a shaft under contract with the company. L was paid by the company, but was, as he knew, under W's direction. L went to sleep at his post, and in consequence R, an employe of W's own, was struck by a falling bucket and injured. It was held that L and R were fellow servants in the employ of W, though L was in the general employ of the colliery company (38). So also a volunteer who places himself under the control of a master becomes the fellow servant

(37) Otis Steel Co. v. Wingle, 152 Fed. 914.

(38) Rourke v. Colliery Co., 2 C. P. D. 205.

of the other employes of the master working for a common purpose.

§ 72. **Same: Servants having a common employment.** To be fellow servants the servants must be in a common employment, working for a common end. A master may be engaged in two businesses totally disconnected except as to ownership. The employees in one business are not fellow servants of those in the other. Thus where a hod carrier employed by M on a building extension of his butcher shop was struck by a carelessly driven butcher cart going out with meat, he was not prevented from recovering from the master on account of the fellow servant rule. The court said of the two men: "They were employed under such different capacities and different classes of work that they are not to be deemed fellow servants engaged in the same common work, and performing duties and services for the same general purposes" (39).

§ 73. **Statutory modifications of the fellow servant rule.** The frequent harshness of the workings of the fellow servant rule has led to the passage of numerous statutes modifying the duties and responsibilities of masters and servants in regard to injuries suffered by servants. In many cases these statutes apply only to railways, but many recent ones have a wider application. In some states the superior servant doctrine is enacted into law, and in others the departmental limitation on the fellow servant rule, either by itself or along with the superior servant limitation. A number of states have passed statutes, some of them confined in operation to

(39) McTaggart v. Eastman Co., 28 N. Y. Misc. 127.

railways, imposing on the master a general liability for injury to a servant by the negligence of a fellow servant, unless the injured servant has been contributorily negligent. It is usually provided in these statutes that any contract by which the employee agrees to waive the benefit of the enactment is illegal, and even without such a provision the courts of Alabama have held the contract void as opposed to public policy (40).

(40) Hissong v. Ry., 91 Ala. 514.

CHAPTER V.

OBLIGATIONS OF AGENT TO PRINCIPAL.

§ 74. **The duty of obedience.** Since the primary purpose of the agent's appointment is that he shall execute the principal's will, subject to the principal's direction and control as to details, one of his cardinal duties is obedience to that will. For losses to the principal resulting from the agent's disobedience the agent is liable, even though he acted in entire good faith and in the exercise of his own best judgment when he disregarded the principal's wishes. Thus where a collector for a bank, when exercising great care of the moneys he had collected, but disobeying the express instructions of the bank as to the disposition of the funds, was robbed of them, he was responsible to the bank for the loss (1).

§ 75. **Same: Gratuitous agents.** Even if the agent is to get nothing for his services, if he has undertaken to act for the principal and has embarked on the performance of his task, he is liable if he does not obey his principal. Thus where A voluntarily and gratuitously undertook to invest the money of a widow, and she gave him express instructions to invest it in a mortgage on a certain farm property, when he disregarded the instructions he was held liable to his principal for a loss she thereby sus-

(1) Rechtscherd v. Bank, 47 Mo. 181.

tained (2). If, however, the gratuitous agent has never entered on the performance of his voluntarily assumed duties, he is not liable for damages resulting from his non-action, there being no consideration to support his undertaking to act (3).

§ 76. **Same: Exceptions.** An agent is not bound to obey an instruction to do an illegal or immoral act. In a case where urgent necessity or a very grave emergency, not admitting of delay for consultation with the principal, causes a deviation from instructions, the agent, if he uses in good faith his own best judgment, will be excused, even though it later appears that another course would have been preferable. In the case of Bartlett v. Sparkman (4), A was asked by P to go for Dr. X, as P's wife was very sick. When A reached X's—fourteen miles from P's house—X was out, and A got Dr. Y. P was held bound by A's act to pay Dr. Y. Again though an agent as agent must obey orders, he may also have a right, in another capacity than that of agent, to act independently as to the same subject matter. P sent A, a commission merchant, coffee to sell, with instructions as to the selling price. A made P a large advance of money on the consignment, and P did not repay the advance. After a considerable time had elapsed A sold the goods for what he could get for them, which was less than the price fixed, and after deducting the amount of his advances sent P the proceeds of the sale. P sued A for damages for dis-

(2) Williams v. Higgins, 30 Md. 404.

(3) Thorn v. Deas, 4 Johns. 84.

(4) Bartlett v. Sparkman, 95 Mo. 136.

obedience. But it was held that A as pledgee had the right to protect himself which was independent of his duty as agent (5).

§ 77. **Loyalty.** Another cardinal duty of the agent is to act in entire loyalty and in the utmost good faith toward his principal. The presumable reason for his employment is that it was sought to secure the exercise of his skill, knowledge, and good judgment on the principal's behalf. Moreover the agent's advantage of knowledge over the principal as to the transactions in which the agent is a direct participant emphasizes the need of securing the agent's fidelity. If A is not acting in P's interests but rather in his own or some third party's, the purpose for which the agency was created is defeated. It is a jealously enforced rule of law, then, that the agent shall not be allowed to occupy a position which will even tend to lead to a betrayal of his trust. Where the agent of a woman principal induced her to invest her capital in a company heavily in debt, and in which he was a leading shareholder, and did this without disclosing these facts to her, he was held liable for a loss she suffered through the investment, even though no wrongful intent on his part was alleged or proved (6). Even after the agent has left the principal's employment, he may be prevented by an injunction from revealing to his new employer trade secrets learned in working for his former principal (7).

§ 78. **Same: Agent cannot make personal profit out**

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(5) Parker v. Brancker, 22 Pick. 40.

(6) Sterling v. Smith, 97 Cal. 343.

(7) Merryweather v. Moore, (1892) 2 Ch. 518.

of his transactions. Apart from his lawful compensation, commission, or salary, an agent can make no profit from a transaction in which he represents a principal. If for example by using, without the principal's knowledge or consent, information acquired in the transaction, he makes any profit for himself, the principal may compel him to account for it. So if an agent sells property entrusted to him for sale at a higher price than that set by the principal, or a higher price than that which he represents to his principal that he received; or if a purchasing agent buys for less than the price set, in all these cases they must surrender their gains to the principal (8). So also if an agent is employed to sell or lease P's property he cannot without P's consent sell directly or indirectly to himself, or to a third party through whom he will acquire title to the property or some benefit in it. P may repudiate the transaction and recover the property (9). If an agent is employed to buy or lease he cannot buy from himself, nor can he buy or lease such property for himself without the principal's consent (10.) So rigidly are these rules enforced that no custom of a market allowing the agent to deal with the principal on his own behalf will be, unless the principal consents, an excuse to the agent for the breach of this duty (11).

§ 79. **Same: Agent cannot represent both parties.** An agent cannot secretly represent the other party in any

(8) Wooster v. Nevills, 73 Cal. 58; N. P. R. Co. v. Kindred, 14 Fed. Rep. 77.

(9) Winter v. McMillan, 87 Cal. 256.

(10) National Bank v. Seward, 106 Ind. 264.

(11) Robinson v. Mollett, L. R. 7 H. L. 802.

transaction on behalf of his principal in which his discretion is enlisted (12). If, however, his work is merely to bring the parties together, and has nothing to do with the formation of the contract, he may thus act for both (13). But wherever his duty to one principal may possibly conflict with his service to a second, he cannot serve the second also without the knowledge and consent of the first. Of course if the agent makes a full disclosure of all material facts concerning the transaction, the principal may waive his rights under the rule. He may allow the agent to represent himself or a third party.

§ 80. **Care, skill, and diligence: Paid agent.** An agent who acts for a valuable consideration is bound to possess and exercise such care, skill, and diligence as are exercised by careful and prudent persons engaged in such undertakings under similar circumstances. "Care and diligence should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are exerted" (14). Thus a country physician is not required to have the skill in treating an infected hand that a metropolitan surgeon would be held to. But reasonable care, skill, and diligence may always be demanded. So when an attorney undertakes to act in a suit for a principal, he is liable if, because he does not possess or exercise the amount of skill ordinarily exercised by a man in that calling, his principal is injured. An agent to loan

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(12) Rice v. Wood, 113 Mass. 133.
(13) Rupp v. Sampson, 16 Gray 398.
(14) Holly v. Gaslight Co., 8 Gray 123.

money is liable for a failure to take due care to obtain security. An agent authorized to take out insurance must inquire as to the solvency of the company and the adequacy of the policy.

§ 81. **Same: Gratuitous agent.** Even when an agent acts gratuitously, if he professes to have special skill, he is liable if he does not exercise it. If he makes no profession he is liable if he is negligent judged by the ordinary standard set for such gratuitous services (15). In any case he is liable if he fails to exercise the skill which he actually possesses. Where A, a skilful rider, at his own request was given by P a horse to show to T for the purpose of negotiating a sale, and A rode the horse upon slippery ground where it fell and broke a knee, it was held that A was liable for failing to use such skill in horsemanship as he really possessed (16).

§ 82. **Accounting.** The agent is bound to keep correct accounts of his transactions and to account to his principal for all money or property which comes to his hands from the principal. If he commingles these with his own so that they cannot easily be distinguished, everything which he cannot clearly prove to be his will be held to belong to the principal (17).

§ 83. **Communication.** The agent must give notice to his principal of all material facts coming to his knowledge in relation to the subject matter of the agency (18). The

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(15) See Briggs v. Spaulding, 141 U. S. 132—a case of bank directors.

(16) Wilson v. Brett, 11 M. & W. 113.

(17) Gray v. Haig, 20 Bev. 219.

(18) Devall v. Burbridge, 4 Watts & S. 305.

third parties who deal with him have a right to expect that communications made to him will be binding on the principal, and the agent owes to the principal that these communications be transmitted to the principal for his guidance in the general direction of the enterprise.

§ 84. Personal discharge of his functions as agent. The agent owes his appointment to the principal's confidence in his fidelity and his capacity for the particular task he is engaged for—in other words to his personal qualities. Hence unless the principal has expressly or impliedly consented to the employment of a substitute, the agent must render his service in person. A publishing house appointed A an agent to handle a subscription book of such immediate interest as to need very rapid distribution, and the court found also as follows: "From a consideration of all the correspondence and circulars connected therewith it is apparent that the contract was purely one of agency. Both parties to the contract evidently believed that the success of the publication depended on the experience, skill, and energy, as well as on the resources and facilities of the general agent." It was held that A violated his duty to P by transferring the task to another (19). So also agents to sell, buy, or lease property, attorneys, arbitrators, executors, auctioneers, and in general all agents whose duties require training, skill, judgment, or other personal qualities, cannot delegate their authority. But an express power to delegate may be given, and the appointment to certain agencies

(19) Bancroft v. Scribner, 72 Fed. 988.

implies consent on the part of the principal that the agent may act through a substitute.

§ 85. **Same: Ministerial acts.** Where the duties to be performed are mechanical or ministerial the agent is allowed to delegate them. Thus an agent to execute a promissory note, if he has himself decided to make the note, may direct his book-keeper to write the instrument (20).

§ 86. **Same: Delegation customary in the particular business.** When the principal should reasonably contemplate the employment of sub-agents as a normal or necessary way of transacting the particular sort of business he entrusted to the agent, he will be held to have impliedly consented to the delegation. So an agent given general charge of a large lumber, ranch, and mining company's business, could delegate to a sub-agent the purchase of blasting supplies (21). So also in cases of transactions as to which it is a well known business custom of agents to delegate authority to sub-agents, the principal impliedly gives consent to such a substitution unless he expressly repudiates it. A, a commission merchant in Boston, was employed to buy goods in New Orleans. It was the well understood custom of the New Orleans market for commission merchants, on receiving an order to buy for a northern account, to employ a cotton broker, and A did this. It was held that A had not thereby violated any duty to his principal (22).

(20) Commercial Bank v. Norton, 1 Hill 501.

(21) Luttrell v. Martin, 112 N. C. 593.

(22) Darling v. Stanwood, 14 Allen 504.

§ 87. **Consequences of a permitted delegation.** In all these cases, if the right to delegate authority to a sub-agent is found, the principal will be liable to third parties for the acts of the sub-agent. Whether, however, the principal will be able to recover against his original agent for an injury through the negligence or otherwise of a sub-agent, depends on the interpretation of the contract between the principal and the original agent. If the agent employs the sub-agent as a complete substitute for himself, in other words if the contract is that the original agent is to appoint another person agent in his stead for the principal, then he himself is liable to the principal only if he has been negligent in the selection of the second agent. If, however, the agent is authorized only to appoint the sub-agent as his own assistant, this substitute is the agent of the agent and not of the principal, and the original agent is liable to the principal for the carrying out of the agency. Different courts interpret the same contract in this matter in different ways; for example, where a bank appoints a sub-agent to collect a note at another place for a customer of the bank, the agent at the place of collection is held by many courts to be the owner of the note, but by others, including the Federal courts, to be the agent of the bank (23).

(23) Exchange Bk. v. Third Nat. Bk., 112 U. S. 289; Dorchester Bk. v. New England Bk., 1 Cush. 177.

PART II.

THE RELATION AS BETWEEN PRINCIPAL AND THIRD PARTY.

CHAPTER VI.

PRINCIPAL'S RESPONSIBILITY FOR TORTS OF AGENT.

§ 88. **Reason for holding the principal responsible.** With the power given a master to act through representatives under legal sanction and protection, the law couples a responsibility on the part of the principal for the acts of his agents in their representative capacity. Hence a principal is liable to third parties for the use made by the agent of the authority the principal has vested in him. This authority may be so used or abused as to involve the principal in obligations under a contract or in liability for a tort. While it is obviously just that a principal should be liable for acts done in accord with his will and instructions, expediency dictates, as the trend of a long course of judicial decisions shows, that a principal should be held responsible not only for the acts he has expressly or impliedly authorized, but also for acts which his authorization made possible, even though he did not contemplate them—acts the result of the agent's carelessness, stupidity, or viciousness, but owing their genesis to the employment. Here the limits of responsibility are fixed by a balance between the desire to hold

the employer, who is responsible because, in Lord Brougham's often quoted phrase, "he has set the whole thing in motion," and on the other hand to extend the field of representative action, with all its invaluable economic advantages, without checking it by holding employers liable for misconduct on the part of their employees, which they could not reasonably contemplate or did their best to prevent. Out of these conflicting ends to be attained the rules have arisen to fix the liability of the principal for the torts of his agent.

§ 89. **Torts actually authorized.** If the tort is expressly commanded the master is liable. M, who claimed a piece of land, instructed his servant, S, to enter upon it, by force if necessary. S did so, entering the land and starting to plow it. T, the rightful owner, tried to stop the plowing, and S pushed him away with great violence. It was held that M was liable not only for the trespass on the land but also for the further act done in carrying out the instructions (1). The authorization may be by ratification as well as by previous direction. If the act is not one authorized, but the form of the instruction, not unreasonably interpreted, led the servant to think he was so authorized, the master is liable. Thus if M tells S to go and get T's team from the stable and use it, and S gets it without asking T's permission, and in using it, by his lack of skill lets a horse be killed, M is liable (2).

§ 90. **Torts necessarily or usually incident to an authorized course of action.** Again, if the act complained

(1) Barden v. Felch, 109 Mass. 154.
(2) Moir v. Hopkins, 16 Ill. 313.

of is a necessary or usual incident to the actually authorized act or course of action, the master is liable to the injured third party for its commission. Thus, a salesman left in charge of a store has implied authority to cause the arrest of a shopper suspected of theft. Where such a salesman, erroneously thinking T had stolen some goods, had her arrested, his master was held liable for the tort (3).

§ 91. **Unauthorized torts committed in the course of the servant's employment and in intended furtherance of the master's business.** Even if the act is not authorized, still if the servant did it in the course of his employment and in intended furtherance of the master's business, the master is liable. But the servant must be acting in the work for which the master hired him. If a gardener without authority takes his master's chauffeur's place, and through his incompetence a third party is injured, the master is not liable. The act was not done in the course of the work for which the gardener was employed (4). And the act must be with an eye to the master's business. If its sole object is the benefit of the servant himself, then (with one exception, to be noted later) the master is not liable. Thus if S, M's delivery driver, while he is using the horses to take home a personal friend of his own, injures T, M is not liable (5). S was not acting with an eye to his master's business, even though engaged in the work for which he was hired. But if both these tests con-

(3) Staples v. Schmidt, 18 R. I. 224.

(4) See Hanson v. Waller, (1901) 1 K. B. 390.

(5) Mitchell v. Crassweiler, 13 C. B. 237.

cur—if the act was done in the course of the servant's employment and with an eye to the master's benefit—however negligently done or however mistakenly as to the ultimate benefit to the master, the master is liable. So where a servant employed at general farm labor, in driving out some cows which had strayed into his master's grain field, struck one with a heavy stone and killed it, the master was liable for the damage done to T's property. The act of driving the cows out was done with the intention of benefiting the servant's master, and it was such an act as the servant was hired for, though the means chosen were badly adapted to the end sought (6). Negligence, carelessness, and even stupidity, in pursuing the course of the servant's employment, and for the master's ends, are not sufficient to remove the act from among those making the master liable. The possibility that acts done through a representative may be done unskilfully or negligently is an obvious one, and the risk that third parties will be injured thereby is placed by the law on the master.

§ 92. **Same: Wilful acts.** Even where the servant wilfully injures a third party, the same question arises: Was he acting in the scope of his employment? If he is not acting in his capacity as servant—as where a street car motorman, who had been insulted by a drunken passenger, left his car when the latter got off and struck him with the controller lever—the master is not liable (7).

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(6) Evans v. Davidson, 53 Md. 245.

(7) Palmer v. Electric Co., 131 N. C. 250. See Limpus v. Omnibus Co., 1 H. & C. 526.

So if the gardener in the case supposed above takes the auto, though forbidden to do so, with an eye to catching a train on which his master is coming, his intent to benefit the master will not make the master liable to a person injured by the gardener's incompetent driving. On the other hand, if the chauffeur, driving the car he is hired to operate, deliberately runs down a private enemy, the master would not be liable. But if the chauffeur, though forbidden to run faster than ten miles an hour, thinks to catch his master's train by going fifteen miles an hour, his wilful disobedience will not free the master from liability. In Garretsen v. Duenckel (8), M was the keeper of a gun store. He had forbidden S, his clerk, to load weapons in the store. On the occasion of the injury to T, S was showing a rifle to a customer who requested to have it loaded in order that he might see how it worked, and refused to buy otherwise. S at first declined, stating that it was against his orders. But for the purpose of making the sale he finally did load the gun, and while he was doing so it went off and shot T, who was standing on the opposite side of the street. The court in an excellent opinion said: "The servant here was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of his authority and engaged in the furtherance of his master's business. There is no pretense that he was trying to do anything for himself. He was acting in pursuance of authority and trying to sell a gun, to make a bargain for his master, and in his eagerness to subserve his master's interest he acted injudiciously

(8) Garretsen v. Duenckel, 50 Mo. 104.

and negligently. It makes no difference that he disobeyed instructions. Innocent third parties who are injured by his acts cannot be affected thereby."

§ 93. **Same (continued).** Even if an agent's purpose is partly selfish, if at the same time he retains some, however little, intent of serving his master's interest and also acts in the course of his employment, the master is liable. In Phelon v. Stiles (9) S was sent by his master, M, to deliver twenty bags of flour to X and six bags to Y. When on his way to X's he came to the road branching off to Y's, he unloaded Y's flour and left it piled by the roadside. The pile frightened T's horse so that T was injured and sued M. M showed that S had piled the bags so as to get through his task more quickly, that he might catch a train for a journey of his own. But M was held liable. The business S was on, was M's business, and though S acted negligently, induced by his own ends, still the act done did not become S's business merely because he dispatched it more quickly on account of a purpose of his own. In general, then, the wilfulness of the servant's act is immaterial if it is done in the course of the servant's employment, and with any idea of benefiting the master. Disobedience and recklessness, just as negligence, are risks which the master must assume so far as third parties are concerned.

§ 94. **Same: Fraud.** This doctrine applies in the case of an agent's fraud. If the fraud is committed for the principal's benefit, the principal is liable. In a leading case the facts were these. T had been selling oats to one

(9) Phelon v. Stiles, 43 Conn. 426.

D, and applied to the P bank, of which D was a customer, for a guarantee of D's solvency. A, the manager of the bank, promised T, on condition that T sold oats to a certain amount to D, to honor D's check to T in priority over any other payment made by D, except payments on his debt to the bank. A knew that D could not discharge his debt to the bank, but concealed this fact from T. T sold the oats and took D's check, which the bank declined to cash. It was held that there was in these transactions evidence from which a jury might well hold that the manager knew and meant the guarantee he gave to be unavailing, but gave it as a means of enabling D to get money from T, so that he might pay it over to the bank. If so, the court held, this act of A's was a fraud on T, and for it the bank would be responsible. As the court said, "No sensible distinction can be drawn between the case of fraud and the case of any other wrong. The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit. ....It is true, he has not authorized the particular act, but he has put his agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in" (10).

§ 95. **Special liability of the master in cases of contract with a third party.** In certain cases, by exception, a master is liable for acts of his servant done in the course of his employment, even when not done with an eye to the master's interest, but solely for the servant's own ends.

(10) Barwick v. English Bank, L. R. 2 Ex. 259.

This is because of the existence of some special duty imposed on the master by law. An example is the duty of care of passengers imposed by law as an incident of the contract of a common carrier with passengers on its road. As the court said in such a case, after laying down the rule that the one question was whether the act was in the course of his employment, "However that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or the malicious violation, of the duty by the agent" (11).

§ 96. **Same: Where the master has entrusted a dangerous instrumentality to the servant.** Again, the nature of the task entrusted to the servant may be such that the master is liable beyond the limits of the ordinary rule. Thus if he has entrusted a dangerous instrumentality to the servant he is liable for any use the servant makes of it, however far removed any idea of benefiting the master was from the servant's mind. Thus in Texas Ry. Co. v. Scoville (12), T was riding on horseback along a road which paralleled the railway track when the engineer and fireman of a passenger train with deliberate intention of

(11) Craker v. C. & N. W. Ry. Co., 36 Wis. 657, 659.

(12) Texas & P. Ry. Co. v. Scoville, 62 Fed. Rep. 730.

amusing themselves by frightening the horse, and with no legitimate purpose whatever, blew the locomotive whistle until T was seriously injured by his plunging animal. It was held that the railway company was liable, despite the fact that the servants, though acting in the course of their employment, clearly acted in complete disregard of the master's interests, and solely for their own purposes. The court said: "Public policy and safety demand that these all-pervading corporations which commit to the custody and use of their servants in such great numbers these terrible expressions of the powerful and dangerous agency of steam shall by the utmost care and diligence protect the public, not only from its negligent but also from its wanton or malicious use by these servants." It is to be observed that the master must have entrusted the dangerous instrumentality to the servant. If a servant takes possession and uses it without authority the master is not liable (13). Just what is included within dangerous instrumentalities is not yet clearly settled by any weight of authority. In a case which held a railway bicycle to be such an instrumentality, the test laid down was "whether the appliance the control and custody of which he committed to his servant's judgment and discretion was dangerous in itself or liable to inflict serious injuries to others when operated in the customary method of use, and while being devoted to the purpose for which it was designed" (14).

§ 97. **Same: Application of doctrine to frauds of**

(13) Sullivan v. L. & N. Ry., 115 Ky. 447.

(14) Barmore v. Vicksburg Ry. Co., 85 Miss. 426.

agent. The reason for the extension of the rule of liability in the case of dangerous instrumentalities is clearly the necessity of holding those, whose acts through representatives are fraught with unusual possibilities of injury to third parties, to a greater responsibility when injury results through the acts of their representatives. A privilege so likely to lead to dangerous consequences is coupled with a heavier liability for its consequences. A wider application of this doctrine will uphold the current of decisions making a principal liable for frauds committed by his agent, even if not for the principal's benefit but solely for the agent's, in all cases where the fraud is made easy of accomplishment because the powers entrusted to the agent are of a sort likely to deceive third parties. For example, the freight agent of a railway company in charge of the company's station, with all its stationery, bill heads and forms, issued a bill of lading for sixty barrels of beans to one W, to be forwarded to one C. The agent had never received any goods from W, and the bill was the result of a conspiracy between W and the agent, by which W might defraud any one who would advance him money on the bill. W drew a draft on C and procured money on it from T, by transferring to him the bill of lading as security. It was held that the railway company was liable to T for the fraud of its agent, to whom it had entrusted its bills, books, and other indicia of a power to bind the company (15). Similar decisions have held a corporation liable for losses resulting from fraudulent share certificates issued by its accredited transfer and certificate clerk (16), and a

(15) Bank of Batavia v. Ry., 106 N. Y. 195.

(16) N. Y. N. H. & H. Ry. v. Schuyler, 34 N. Y. 30.

telegraph company for a fraudulent telegram for money issued by its agent authorized to accept and transmit telegrams (17). This exceptional holding of the principal liable, where the act of the agent is not for the principal's benefit but is made possible by the principal's having entrusted to the agent a power peculiarly liable to a misuse of a sort dangerous to the business community, has not met with universal approval. Fraud, to make the principal liable, must be for his benefit, in England and in some courts of the United States (18).

§ 98. **Exception in case of public agencies.** The doctrines of the principal's liability for the torts of his agents do not apply to public agencies—the state, municipal corporations in their governmental capacity, and public officers generally. Obvious reasons of public policy explain this exception. So also a public charity is, by the weight of American authority, held not to be responsible for the torts of its servants, though it is responsible if it does not use due care to provide proper facilities for the performance of its public duties. Thus a charitable hospital is not liable for injury to a patient from negligent treatment given him by the physicians and nurses it employed, when it had exercised due care in their selection (19).

§ 99. **Master not liable for acts of independent contractor.** To fix liability on a principal for the torts of one who is executing his will, it is necessary to show that the wrongdoer is in fact the principal's agent or servant. If

(17) Bank of Palo Alto v. Pacific Cable Co., 103 Fed. Rep. 841.
(18) Friedlander v. Texas P. Ry. Co., 130 U. S. 416.
(19) Hearn v. Waterbury Hospital, 66 Conn. 98.

I procure a contractor to build a house for me according to plans and specifications I furnish him, I am not ordinarily liable for his torts or those of his servants, for the contractor is not my servant. He is not under my direction or control as to the details of his work. His contract binds him to present me with a finished product. Except so far as stipulated in the contract, I retain no power to direct or control his methods of achieving the prescribed result he has contracted to furnish me—the completed building. The difference between the servant and the independent contractor lies in the power the master has to direct and control the details of the servant's work (20). It is immaterial whether he does in fact exercise this power; so long as the relation created permits him to do so the representative is his servant. The master is not liable for the acts of an independent contractor unless he is under statutory or contractual liability to insure the safe execution of the work (21), or unless the act itself contracted for is wrongful, in which case he is practically a joint wrongdoer with the contractor who carries out his will (22).

§ 100. **Master not liable for torts of servant temporarily transferred to another master.** If M lends or leases to N the services of S, a servant whom M hires, and during the course of S's work for N, S injures T, M's liability depends on the nature of the arrangement between him and N as to who shall have control of S while he is work-

(20) See Lawrence v. Shipman, 39 Conn. 586.
(21) Smith v. Milwaukee Exchange, 91 Wis. 360.
(22) Ellis v. Sheffield Co., 2 E. & B. 767.

ing at N's work. If S is to obey N's directions as to how the work is to be performed, and in general to be controlled as to his conduct by N, then N is responsible for any tort which would make a master liable (23). But if the arrangement is such that M is an independent contractor, sending his servant S to carry out his contract, and N's power to direct S is confined to showing him the work to be done, then M is still responsible for S's torts (24). If, finally, M retains control as to some acts and N as to others, the master as to the act in the course of which the tort was committed will be liable. Thus M, a general contractor, leased a number of teams with their drivers to the city of Q for work on a street Q was paving. M's drivers had as one of their duties to attend to the shoeing of their teams. S let the shoes on his team get loose, and a horse kicked a shoe through T's window. T was allowed a recovery against M, in whose service S had been negligent (25). Had S dumped a load of stone into T's window Q would have been liable.

§ 101. **Master not liable for torts of an interloper.** We have seen that the master may be made liable by the tort of one who without his request but with his assent, express or implied, engages in his service. See § 18, above. But if for his own ends or those of a third party, and without the master's authorization, he undertakes to render him service, he is a mere interloper and his acts impose no liability on the master (26).

(23) Rourke v. Colliery Co., 2 C. P. D. 205. See § 71.

(24) Wood v. Cobb, 13 Allen 58.

(25) Huff v. Ford, 126 Mass. 24.

(26) See Haluptzok v. G. N. R., 55 Minn. 446.

CHAPTER VII.

PRINCIPAL'S RESPONSIBILITY FOR CRIMES OF AGENT.

§ 102. **Civil liability.** As crimes are also private wrongs, the civil liability of a principal for the crimes of his agent or servant is governed by the rules laid down for tort liability. In addition to the torts at common law, for which the master is liable in damages, statutes have enlarged the field of tort liability and affixed penalties, recoverable by the party injured, to these statutory torts. In such a case the penalty is recoverable from the master, if the wrong done by the servant is within the rule making the master liable in tort. Thus where a Wisconsin statute prohibited a denial to citizens of equal rights to the accommodations of public restaurants under penalty of fine, a restaurant keeper was fined for a refusal by his waiters to serve a colored man (1).

§ 103. **Criminal liability: In general liable only for authorized acts.** To hold a principal responsible for the torts of his agent is quite different from holding him morally guilty. Responsibility is consistent with entire ignorance and innocence of the agent's act or vigorous disapproval of it. But in criminal liability a particular state of mind is generally an essential element. Hence a principal is not criminally liable for the acts of his agent

(1) Bryan v. Adler, 97 Wis. 124.

unless he can be shown either to have authorized them, assented to them, or been so negligent in controlling his agent that the act may be said to result from his criminal negligence.

§ 104. **Same: Exceptions.** There are, however, certain statutory crimes which form an exception to this general rule. As the court said in the case of People v. Roby (2): "As a rule there can be no crime without a criminal intent, but this is by no means a universal rule....Many statutes which are in their nature police regulations.... impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." This case was one in which a clerk of the owner opened a saloon on Sunday and sold a drink, thus violating a Sunday closing statute. The court interpreted the statute as making it the principal's duty to see that the prohibited acts were not committed, whether by the principal himself or by any of his agents or servants. The statutes most frequently interpreted thus are regulations under the so-called "police power," as the sale of foods and liquors, Sunday observance, etc.

(2) 52 Mich. 577

CHAPTER VIII.

PRINCIPAL'S RESPONSIBILITY FOR CONTRACTS MADE ON HIS BEHALF BY AGENT.

§ 105. **Division of subject.** The characteristic function of an agent is to make contracts for his principal. In most cases in making these contracts he discloses who his principal is, but circumstances not infrequently arise where business reasons make a contrary practice desirable. The legal difference between contracts for a disclosed and those made for an undisclosed principal suggests a separate treatment of the two.

Section 1. Contracts Made for a Disclosed Principal.

§ 106. **General rule.** A principal is bound to third parties by any contract made by his agent within the scope of the agent's authority. He is not bound by any contract made outside the agent's authority, and the duty of ascertaining the extent and limits of the authority is laid strictly on the third party who deals with the agent.

§ 107. **Extent of agent's authority.** The agent's authority to bind his principal by a contract includes: (1) authority actually conferred on him by his principal's instructions, either explicitly or by necessary implication; (2) authority incidental to agencies of the sort to which the agent is appointed, and under the circumstances of his appointment and his field and method of operation;

(3) authority apparently conferred by the conduct of the principal.

§ 108. **Authority actually conferred binds the principal.** Within the authority which the principal has expressly conferred on the agent, any act of the agent is in legal effect the act of the principal. The relation of agency has been created for the very purpose of having these acts done. The authority actually conferred includes also the authority which by necessary implication is involved in the express authority. So an agent explicitly authorized to deliver all the freight of a railroad in Chicago was held to have implicit authority to make terms in regard to its delivery, and the railroad was held liable on the contract he had made on its behalf to deliver certain parcels at a certain address within the city (1).

§ 109. **Forms of conferring express authority and their construction.** The express authority may be conferred in a variety of forms, from the formal instrument under seal, the power of attorney, through instruments not under seal of varying degrees of explicitness, contracts of agency, mere notifications of appointment, and so forth, to a mere oral direction. In ascertaining the extent of the authority conferred by these different methods, the courts construe the more formal more strictly against extended powers. The third party, in determining the extent to which he is justified in relying on the agent's authority, is held to a careful examination of the formal power and a reasonable interpretation of any general language in it. Thus a power of attorney authorizing

(1) Mich. So. Ry. Co. v. Day, 20 Ill. 375.

an agent generally to issue notes in the name of his principal will be construed to extend only to notes issued in the course of the principal's business and for his benefit (2). An explicit definition of the extent of the agent's authority in writing is the best safe-guard of the principal from liability on contracts made by the agent.

§ 110. **Incidental authority: In general.** In addition to the actual authority conferred by the principal's instructions, the agent in his dealings with third parties who do not know the content of these instructions is clothed with incidental authority arising out of the nature and circumstances of the agency. For instance, when a man engages the services of a factor he is bound, so far as third parties are concerned, by the factor's exercise of any of the powers which business custom has conferred on agents in this occupation. Thus a factor whom the principal has authorized to sell flour on commission may, without further authorization, warrant that the flour is sound and not musty; for it is a valid business custom for factors to sell flour on such a warranty (3). Even if the principal had expressly forbidden the factor to make this warranty, if the factor in disobedience to his intructions actually does make it, the principal is still bound to the party to whom the warranty was made, unless such party actually knew of the contrary instruction. It is a custom of the business world, and one which long ago received legal sanction, that a commission merchant may make usual warranties of

(2) Craighead v. Peterson, 72 N. Y. 279.

(3) Randall v. Kehlor, 60 Me. 37.

quality concerning goods entrusted to him for sale, and no instruction given him by his principal unknown to the third party who deals with him, will free the principal from the burden of this authority, conferred as a usual incident of an appointment to act as factor. About a large number of professional agencies, for instance the vocations of auctioneer, broker, attorney, and cashier, as well as factor, has grown up a body of business customs which have received legal recognition, on the theory that when a principal appoints a professional agent he must intend him to exercise such powers, and in such manner, as business usage has prescribed for such an agent. Even when an agent is not by occupation a member of one of these special classes, he may be presumed by third parties to have the right to deal according to the customs governing the particular sort of business he is set to do, and in the particular place in which he is set to do it. So a commercial traveller for a Chicago house, carrying trunks of samples in the rural districts of Wisconsin, had, as an incident of the business he was employed for, authority to contract livery bills on the credit of his house (4). So also where a London merchant made in Liverpool a contract with a Liverpool broker, the usage of the Liverpool market was held to govern the broker's authority. As one of the judges said: "When a broker is employed in a particular market, he is presumed to be vested with authority to purchase according to the usage of that market" (5).

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(4) Bentley v. Doggett, 51 Wis. 224.

(5) Graves v. Legg, 2 H. & N. 210.

§ 111. **Same: Where the principal instructs against the use of incidental authority.** It will be noted that the principal does not invest the agent with this authority except in so far as silence on points of custom or usage is tantamount to its adoption even as between the principal and the agent. But the principal may forbid the agent to exercise these incidental powers. Then as between the agent and the principal himself, the principal may recover damages against the agent for his disobedience and its results; but unless the third parties with whom the agent deals are aware, either through information from the principal, or in any other way, that the agent has not in fact the authority usually incident to such agency as he exercises, the principal will be bound by the forbidden contract. Thus in the case of the commercial traveller discussed above, the traveller had been provided by his firm with money with which to hire livery horses, and forbidden to run bills, but when he disobediently did hire a horse and wagon from T, who did not know of his instructions, T was allowed to recover from the firm. The principal cannot by instructions to the agent, of which the third party who contracts with the agent is ignorant, limit the authority the agent has as incident to the nature of his agency.

§ 112. **Same: Illustrations of authority incident to the nature of the agency.** The extent of the incidental authority of an agent depends so much on the variable elements of custom and business usage in different employments, different markets, and different business communities, that any complete definition of it is quite impossible. Some illustrations may, however, be considered.

§ 113. **Same: Agents to sell.** An agent to sell property of any kind must sell for a money consideration, and cannot without special authorization bind his principal by taking in payment notes or other commercial paper (6). He cannot make exchange for other property. He cannot transfer to pay or secure the principal's debts or his own debts (7). An agent to sell real estate must usually be appointed in writing, in many jurisdictions by a power of attorney under seal, and his authority, as is usual in the case of written appointments, is strictly construed; so he must sell on the terms his principal directs, and a sale on others, even if better for the principal, will not bind him (8). But his power to sell gives him power to execute conveyances, and in the majority of American jurisdictions to make a covenant of general warranty (9). An agent to sell personalty may usually make warranties of the quality of the goods, may receive payment if he has possession of the goods, but may not if he sells for future delivery. So in general a travelling salesman selling goods by sample, or merely soliciting orders, has no incidental authority to receive payment therefor (10).

§ 114. **Same: Agents to purchase.** An agent to purchase, unless some special trade or local custom warrants it, may not purchase on credit if he is furnished with funds (11). If he is not given funds but yet ordered to

(6) Buckwalter v. Craig, 55 Mo. 71.
(7) Stewart v. Woodward, 50 Vt. 78.
(8) Dayton v. Buford, 18 Minn. 111.
(9) LeRoy v. Beard, 8 How. 451.
(10) Butler v. Dorman, 68 Mo. 298.
(11) Wheeler v. McGuire, 86 Ala. 398.

buy, he may buy on credit (12), but usually cannot bind his principal by a promissory note. He must observe his instructions as to the quantity and kind of goods he buys, and if so directed by his master must buy from a person selected by the master (13). He has incidental authority to fix the terms of the transaction (14), and may arrange for shipment and delivery of the goods.

§ 115. **Same: Agents to manage a business or property.** A managing agent has the powers necessary to the efficient control of the business, that is, power to do all that is ordinarily done in the operation of a business of this particular sort (15). But he has not power to change the nature of the business or dispose of it; and his power to make negotiable paper and to borrow money is very narrowly limited (16).

§ 116. **Same: Factors.** Any full consideration of the various agency occupations is beyond the scope of this article, but a brief enumeration of some of the main distinguishing powers of the principal forms may be made. A factor or commission merchant is a professional agent whose business is the selling of goods on commission. It is a business with a large body of attached business custom which gives a factor large incidental powers. He has possession of the goods he deals with, and sells in his own name, so that innocent purchasers from him are in no position to know whose goods he is selling or what instruc-

(12) Brittan v. Westall, 137 N. C. 30.
(13) Peckham v. Lyon, 4 McLean 45.
(14) Owen v. Brockschmidt, 54 Mo. 285.
(15) Edmunds v. Bushell, L. R. 1 Q. B. 97.
(16) Temple v. Pomroy, 4 Gray 128.

tions he has from their owner. Hence for the protection of his customers the factor has been allowed by law, both common and statutory, large authority to bind his principal to third parties by his contracts. He may sell in his own name, either for cash or credit (17); may receive payment in cash or negotiable paper (18); and may fix the terms of his sale as to time and prices (19). But at common law he has power only to sell; he cannot, except where he has made advances on the goods, either barter or pledge them (20). This is likely to prove a hardship on persons dealing with factors, especially as the latter are not infrequently dealers on their account as well as for others. They may have in their possession goods partly those of others and partly their own, all salable in their own name and on their own terms. Their own goods they can barter or pledge for their debts. An innocent third party dealing with them may get goods which they profess to own but which are in reality goods of a principal consigned to the factor for sale. For the protection of people thus dealing with factors a number of states have passed factors' acts, with provisions designed to prevent frauds on innocent purchasers. Thus the New York act, the earliest American statute, provides: "Every factor or other agent entrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every factor or agent not having the documentary evi-

(17) Goodenow v. Tyler, 7 Mass. 36.
(18) Pickering v. Busk, 15 East 38.
(19) Smart v. Sandars, 3 C. B. 380.
(20) Warner v. Martin, 11 How. 209.

dence of title who shall be entrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by any such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable obligation in writing given by such other person upon the faith thereof." The party taking the goods is not made the owner, but the true owner, in order to reclaim, must repay any advances the third party has made on the goods. See Sales, §§ 75, 81, in Volume III of this work.

§ 117. **Same: Brokers.** A broker is an agent whose business is the negotiating, usually for others and upon a commission, of purchases or sales of goods—real property, stocks, commercial paper, and other merchantable commodities. Strictly speaking, the word broker is applicable only to middlemen who bring together the principals for a contemplated transaction and have nothing further to do with the contract itself. A broker as distinguished from a factor does not normally have possession of the articles he deals in. For these reasons his incidental authority is much more restricted than that of a factor. In the case, however, of brokers dealing in shares on a stock exchange, the customs of the exchange may very greatly enlarge the usual broker's authority. Each exchange has its own rules, and, as we have seen, a principal acting through a broker in a given market is bound by any custom of that market that is reasonably consistent with the existence of an agency relation. It is im-

material in such a case that the principal did not know of it (21). Brokers in general, in contracting for a principal with third parties, have power incidental to their business to fix terms and prices (22). But they cannot receive payment, nor in the absence of a special custom or express authority make a warranty as to the subject matter they deal in, give credit to a buyer, or act through a substitute (23). They must act in the name of their principal.

§ 118. **Same: Auctioneers.** An auctioneer is a professional agent whose business it is to sell at public sale to the highest bidder. He has incidental power to prescribe the terms and conditions of sale (24). He can receive the purchase price of personal property which he has been given authority to sell, but if he sells real property he is not entitled to receive the price unless the published terms of sale prescribe that a payment, for example a deposit, is to be made at the time of sale. This he has a right to receive. Without special authority he cannot sell on credit, nor at a private sale, nor with warranties which will bind the principal, nor through a substitute (25). He cannot make any binding representations as to the subject matter of his agency which vary the advertised description (26), but he may make such as are merely explanatory of it.

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(21) Van Dusen Co. v. Jungeblut, 75 Minn. 298.

(22) Daylight Burner Co. v. Odlin, 51 N. H. 56.

(23) Higgins v. Moore, 34 N. Y. 417; Dodd v. Farlow, 11 Allen 426.

(24) Bush v. Cole, 28 N. Y. 261.

(25) Williams v. Millington, 1 H. Bl. 81; Blood v. French, 9 Gray, 197.

(26) Poree v. Bonneval, 7 La. 386.

§ 119. **Same: Attorneys at law.** An attorney at law in his relation to his client is an agent whose business it is to prepare and try cases and to give advice on legal matters. In the case of Moulton v. Bowker (27), his authority is thus described: "An attorney at law has authority, by virtue of his employment as such, to do on behalf of his clients all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of the action." This indicates that an attorney has large incidental powers, and for obvious reasons. As the court said in a Mississippi case: "To impose on the attorney the necessity of consulting his client whenever propositions are made to him in regard to those matters which in his judgment are advantageous, would so embarrass and thwart him as in a great measure to destroy his usefulness; hence it is that the courts quite generally concede to the attorney unlimited authority over the conduct of the litigation, including the power to control all legal process, and to compromise or release all attachment or other liens which have accrued in the progress of the cause, as collateral thereto, and not belonging to the original demand" (28). The applications of these principles are too numerous for more than mere illustration. An attorney may serve or accept service of all necessary papers during the progress of the cause (29); he may get briefs printed at his client's expense; he may release an attach-

(27) 115 Mass. 36.

(28) Levy v. Brown, 56 Miss. 89.

(29) Com. v. Schooley, 5 Kulp. 53.

ment before judgment, or direct a levy to collect a claim. On the other hand he has no incidental power to confess judgment, or in general "compromise the rights of his client outside of his conduct of the action, or accept less than the full satisfaction sought, or subject him to a new cause of action" (30).

§ 120. **Authority by estoppel.** If a principal so conducts himself as to lead a third party to believe that the agent is his agent, the principal will be held to the same liability on a contract made by the third party with the agent, in bona fide reliance on the principal's conduct, as if the agent were actually the principal's agent. Thus in the early case of Hazard v. Treadwell (31), P was an ironmonger who sent A, a waterman, to T to buy iron on credit, and paid for it afterwards. He sent A a second time with ready money, and T gave A the iron as before, but A did not pay over the money. When T attempted to collect from P, P denied that A had authority to buy on credit. T sued P and was allowed to recover, on the ground that P's conduct in sending A the first time with authority to buy on credit, and then sending him a second time without notice to T that A's authority was this time less, made P liable on the second contract.

§ 121. **Same: Distinguished from incidental authority.** Authority by estoppel should be distinguished from incidental authority. Incidental authority is actual authority. Even if the principal in his instructions to the agent has forbidden him to exercise it, still it is a part of

(30) Pfister v. Wade, 69 Cal. 133; Lewis v. Duane, 141 N. Y. 302.
(31) Hazard v. Treadwell, 1 Str. 560.

the authority conferred when the principal made the agent his agent to do a particular kind of service; and unless the third party knew of the principal's prohibition it is authority enough to entitle him to enforce a contract made under it. To recover from the principal on a contract made with an agent, a third party has either to show that the agent actually had authority, or that the principal is estopped to dispute that the agent had it. A principal is estopped only when the third party has in good faith so relied on the principal's conduct as to change his legal position to his detriment. He must then, in order to hold the principal on this so-called authority by estoppel, himself show a reasonable reliance in good faith on the conduct of the principal. But to recover on the ground of the agent's incidental authority, the third party need merely show the existence of such an authority in an agency of this sort, and unless the principal can show that in the particular case the third party knew or was put on notice of a special limit, within the lines of the authority usual in such an agency, the principal will be bound by the agent's contract.

§ 122. **Limits of principal's liability.** Not every contract made by the professed agent of a principal, however, makes the principal liable. Third parties can hold the principal only where the agent had authority, or where the principal's conduct, reasonably and honestly interpreted, misled them into dealing with a professing agent as if he had authority. In every case, the third parties who deal with an agent instead of directly with a principal do so at their own risk of being mistaken as to

the agent's powers. The law imposes on them the duty of making proper and diligent inquiry as to the actual existence and extent of the agent's authority, and they have no right to rely on any statements the agent himself makes about it. In the case of Martin v. Great Falls Manufacturing Co. (32), A was an under bookkeeper in the cotton factory of the P Company, which employed also a head bookkeeper and a general manager. A came to T, who knew his position in the P Company's staff, and represented that he wished to borrow $150 for the company, which, he said, had some settlements to make. T gave him the money, and received in return a memorandum as follows: "Borrowed of T for Co. $150. A." A absconded with the money, and T sued the company for the payment. It was held that T could not recover from the company on the memorandum; he had no right to rely on A's representation as to his authority, and A's position with the company did not clothe him with incidental authority to borrow for it.

§ 123. **Exceptions to the rule of principal's liability.** Two exceptions are to be noticed to the limits of the principal's liability for contracts made by his agents. If the principal entrusts negotiable paper to his agent he is bound by the agent's dealing concerning it with purchasers in good faith or pledgees for valuable consideration and without notice. This is due to the legal rules governing negotiable paper (33). In the second place, in the jurisdictions under factors' acts, the same rule of liability

(32) Martin v. Great Falls Mfg. Co., 9 N. H. 51.

(33) See the article on Negotiable Instruments in Volume VII of this work.

obtains where a principal has entrusted goods to a factor. See § 116, above.

Section 2. Contracts Made on Behalf of an Undisclosed Principal.

§ 124. **In general.** As has already been remarked, circumstances not infrequently arise which make it desirable or convenient for business reasons that an agent deal with third parties in his own name rather than his principal's, and without disclosing the fact that he is acting for a principal. For instance, if a manufacturing company is seeking to acquire a considerable tract of land for a factory site it will obviously be expedient for the company to buy the lots from the individual owners in its agent's name, rather than its own. Factors generally deal in their own name, and the practice is not uncommon in many sorts of agency. The agent may disclose the fact that he has a principal but conceal the principal's identity, or he may keep undisclosed the existence as well as the identity of the principal.

§ 125. **Liability of undisclosed principal for contracts made by his agent.** It is obvious that in cases where even the principal's existence is not known to the third party the contract is made between the third party and the agent, while the third party relies solely on the credit, character, and substance of the agent. But the agent has not acted on his own initiative. The primary responsibility for the transaction is with the principal, and the contract is after all with the principal, "who set the whole thing in motion." Therefore in general, if the third party discovers that the contract was made by the

agent on behalf of a principal, he can hold that principal liable on the contract. Thus in the case of Kayton v. Barnett (34), A, who was secretly acting for P, sought to buy a certain patent right from T. T was very unwilling to sell the right to P, and suspecting that A was acting for P, he inquired as to this, and was told by A that he was buying for himself and not for P. T then sold the patent to A, who paid for it in part but died before completing the payments. When T discovered that A had been acting for P he brought suit against P for the balance due under the contract, and was allowed to recover. The main ground for the decision was that P had directed every step in the negotiations carried on by A. A was merely P's agent, his mind in the transaction being P's mind, so that the court found an actual meeting of minds such that the contract was really P's and T's. In this particular case P actually got the benefit of the agent's purchase, but that fact is really immaterial. If the agent puts the proceeds of a transaction with the third party in his pocket, the third party when he discovers the principal may recover from him on the contract, even though the agent had defrauded the principal of the benefit he sought. The principal has been the originating cause of the contract's being made, and so of the third party's legal detriment. The liability of the undisclosed principal to third parties is exactly the same as that of the disclosed principal. He is liable for all acts of his agent within the scope of the agent's authority express and incidental. Even though the agent was expressly pro-

(34) 116 N. Y. 625.

hibited from making the particular contract under which a third party, who did not know of the prohibition, sues, if such a contract was within the incidental powers of such an agent the undisclosed principal will be liable on it. Thus in the leading case of Watteau v. Fenwick (35) A was the nominal proprietor of a saloon in reality owned by P. P was a brewer who had forbidden A to get his stock anywhere but of him. The prohibition included direct purchases of cigars and other usual bar side-lines. A in disobedience to these instructions bought cigars from T, and also some goods not customarily handled in saloons. T, when he discovered who the real principal was, brought suit against P for the price of all the goods. He was allowed to recover the price of the cigars, but not of the other articles. The purchase of the cigars was within the incidental authority which P gave his agent when he allowed him to run a saloon business for him, even though he had forbidden A to exercise this part of his authority. But the purchase of the other articles was not within his incidental authority, and so T had no right to seek a remedy against the principal. Of course T had a right of action against A himself for these as well as the cigars; and he could not complain that he had no right against anyone else, since he had sold the goods to A in sole reliance on A's character, credit and substance.

§ 126. **Exceptions to liability of undisclosed principal: Written contracts.** The doctrine of the undisclosed principal is subject to several exceptions. An undisclosed principal is not liable on a contract under seal made in

(35) Watteau v. Fenwick, (1893) 1 Q. B. 346.

the agent's name. This is on account of the technical rule of the common law with regard to instruments under seal, that only the parties named in the instrument can be sued on it (36). For a similiar reason, originating in the law merchant, an undisclosed principal cannot be sued on a negotiable instrument where only his agent's name appears; but the third party in this case may sue the principal on the original consideration, disregarding the negotiable instrument (37). As to written contracts other than instruments under seal and negotiable instruments, the rule of the principal's liability applies even where the agent's name is the only one to appear in the writing (38). The parol evidence rule is held not to be violated by adding the liability of the undisclosed principal to the liability of the party whose name already appears on the contract—the agent (39).

§ 127. **Same: State of accounts between principal and agent.** Another exception to the rule of the undisclosed principal's liability, but one the exact limits of which are in some dispute, depends on the state of accounts between the principal and the agent at the time the third party makes his claim against the principal. In England in an early case on the subject, the facts were these: T sold goods to A, who bought for P, but without disclosing that fact. In due time P gave A the money to pay T, but A did not turn it over to T. T, having discovered P's relation to the contract, sued him on it; and the case

(36) Briggs v. Partridge, 64 N. Y. 357.
(37) Pentz v. Stanton, 10 Wend. 271.
(38) Lerned v. Johns, 9 Allen 419.
(39) Higgins v. Senior, 8 M. & W. 834.

turned on whether P's bona fide payment to A for T was a defense for him. It was held not to be, the court saying that P was bound not merely to pay his account to his agent but to see that the agent whom he had appointed, and for whom he was therefore responsible, discharged the obligation to T which the principal had incurred through the contract of the agent (40). But, as the court suggested in the case, if T by his actions had induced P to pay the money over to A in the bona fide belief that such an act would satisfy T, then T would be estopped to claim from P. Thus if T should say to P, "I expect you to have the money in A's hands by August 1, to meet the debt I have against you, on the contract I made with him," a subsequent bona fide payment over to A would discharge P's obligation to T. The general American doctrine seems to be that even if the undisclosed principal's payment to his agent is not induced by the conduct of the third party, the fact that he has in good faith put the money into the hands of the agent before he became known as principal, so that A was at the time still the party on whom T was relying, will be a sufficient defense against a subsequent suit by T (41).

§ 128. **Same: Third party's election.** The third party has of course a right of action against the agent with whom he contracted and on whose credit he relied. He has also, as we have seen, a right against the principal, who was the prime cause of the agent's contract. But he has not a right against both. If, after discovering that

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(40) Heald v. Kenworthy, 10 Exch. 739.

(41) Laing v. Butler, 37 Hun. 144.

the agent was merely an agent, and learning who the principal was, the third party decides to hold the agent, he cannot, after once unequivocally signifying his intention of looking to the agent for payment, subsequently make a claim against the principal. Thus where brokers who had been instructed by A to sell short certain stocks did so, and, though they were next day told by A that he was acting for P, proceeded thereafter to sue A and garnish a debt due to him, it was held that having elected to hold A, they could not later bring suit against P (42). It is to be noted that the election must be made after full knowledge of all the facts, so that if the brokers' suit had been brought against A before they knew that he was acting for P, they could still have sued P (43). When the third party has decisively elected to hold the agent is a question of evidence. It has been held that proving a claim against him in bankruptcy is not an election, nor is taking his promissory note. Even bringing an action is not conclusive evidence, but the better opinion seems to be that the pursuit of an action against the agent to judgment, whether the judgment is satisfied or not, bars a subsequent suit against the principal (44).

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(42) Barrell v. Newby, 127 Fed. Rep. 656.

(43) Steele Smith Co. v. Potthast, 109 Ia. 413.

(44) Cobb v. Knapp, 71 N. Y. 348; Kingsley v. Davis, 104 Mass. 178.

CHAPTER IX.

PRINCIPAL'S RESPONSIBILITY FOR STATEMENTS AND KNOWLEDGE OF AGENT.

§ 129. **In general.** The principal may be responsible not only for his agent's acts but also for his words. Whatever statements, admissions, or representations, are appropriate accompaniments of the act the agent is authorized to do, are included in the authority given him, and the principal is bound by them. In a leading English case on the subject the court said: "As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal, by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words" (1).

(1) Fairlie v. Hastings, 10 Ves. Jr. 123.

§ 130. Agent's statements as to the fact of agency. We have seen that an agent's statement that he is an agent, or that he has certain powers as agent, does not bind a principal. But on the question of the existence or scope of an agency the agent is a competent witness in a court of law as to facts within his knowledge, either in his own behalf or for another. Thus in a suit by an attorney against a corporation for the price of his services, where the defence was that he had acted solely for the president and not for the company, the attorney was allowed to testify on his own behalf that he had been employed as the attorney for the company, and rendered his services to it (2). And where suit was brought against P by the holder of a note signed by A as agent for P, A's evidence that he had been given authority as P's agent to sign notes for him was admitted (3).

§ 131. Agent's statements as a part of the transaction. If the agent has been shown to have authority to act as agent in a given transaction, then the statements, representations, and admissions made by him while acting in the transaction, and tending to characterize and explain it, or to form an appropriate accompaniment of it—in a word, constituting a part of the act authorized—will be binding on his principal. So when an agent negotiated a sale of coal by Pool measure, and the coal when delivered was short in weight, the agent's statement was admissible in an action against the principal (4). It was made as a part of the transaction and during its carrying out.

(2) Indianapolis Chair Co. v. Swift, 132 Ind. 197.

(3) Rice v. Gove, 22 Pick. 158.

(4) Peto v. Hague, 5 Esp. 134.

But when a station agent who had failed to send on a consignment of freight as he had contracted on behalf of his principal, was asked by the sender, a week after the time for the performance of the contract, why he had not done so, and answered: "I forgot," this admission as to a past transaction was held not to bind his principal (5). Not only is proximity in point of time essential to making whatever is said by the agent admissible against his principal, but, as the court said in Butler v. Manhattan Ry. (6), "that alone is insufficient unless what was said may be considered a part of the principal fact, and so a part of the act itself." It is essential, of course, that the statement of the agent be made as to matters within the scope of his authority. It is not sufficient that he be an agent of the principal; he must be an agent with authority for this particular transaction. Thus the admission of a pawnbroker's assistant that his master had loaned money on some plate, the loan having been made at his own home outside his business, and as a private transaction, was held inadmissible as evidence against the master, since "there was no evidence to show the agency of the shopman in private transactions unconnected with the business of the shop" (7). If the agent can be shown to have an interest in the transaction adverse to the principal's, his statements, even as to matters touching his agency, will not bind his principal (8).

§ 132. Notice to the agent is notice to the principal.

(5) Great Western Ry. Co. v. Wells, 18 C. B. (N. S.) 748.
(6) 143 N. Y. 417.
(7) Garth v. Howard, 8 Bing. 451.
(8) Manhattan Life Ins. Co. v. Ry., 139 N. Y. 146.

As we have seen, one of the agent's duties to the principal is that of communicating to the principal all material facts relative to the transaction in which he is employed. (See § 83, above.) If, then, P appoints A to represent him, A is his representative to receive and ascertain all these facts, and A's knowledge of them will be imputed to P. If T tells A a material fact as to the contract in process of being made between him and A, for P, he may presume that this fact is duly imparted to P, and if A learns it in any other way the same presumption is made. Thus where A, the renting agent for P, learned in the course of collecting his rents that P's premises were being employed as a gambling house, this knowledge was attributed to P, so that he could not recover the rent on the building used for an illegal purpose (9). This rule has frequent applications in cases where an agent knows that the principal's premises are unsafe or his machinery defective. Proof that the agent in charge of these matters knew of the defects will show that the principal is responsible to persons injured thereby (10).

§ 133. **Same: Limitations of rule.** Notice to the agent to be binding on the principal, must be notice given when the agent is acting in the scope of his authority, and must relate to the business in which the particular agent is engaged. In the case of Congar v. Chic. & N. W. Ry. Co. (11), it was sought to hold the company liable for sending some nursery stock belonging to T to a wrong address,

(9) Ryan v. Potwin, 62 Ill. App. 134.
(10) Denver v. Sherret, 88 Fed. Rep. 226.
(11) Congar v. C. & N. W. Ry. Co., 24 Wis. 157.

with the result that the trees died on the way. The shipping agents in Chicago, where the trees were delivered to the railway, were not negligent; but not knowing, as did the Iowa agents of the railway, that there were two towns of the same name in Iowa, they shipped the trees to the one which was directly on their line, whereas the consignee lived in the other. To fasten negligence on the railway, T urged that the knowledge of the Iowa agents was the knowledge of the company, but the court decided otherwise, saying: "The principal is chargeable with the knowledge of his agent, because the agent is substituted in his place and represents him in that particular transaction; and it would seem to be an obvious perversion of the doctrine if in the same transaction the principal were likewise to be charged with the knowledge of other agents not engaged in it, and to whom he had delegated no authority with respect to it."

§ 134. **Notice must be received in the course of the agency.** If the information has been acquired before the agency began, the rule of the majority of American courts is that the agent's knowledge is notice to the principal only when the agent actually had the fact in question in mind at the time of his transaction for the principal, and also when it was not such a fact as a due regard for his duty to an earlier principal would inhibit him from disclosing to the one sought to be charged. In the case of The Distilled Spirits (12), P sought to reclaim from United States officers distilled spirits which they had seized for a violation of the revenue laws, and P claimed

(12) The Distilled Spirits, 11 Wall. 356.

to have bought them through A without any knowledge of the violation. A was alleged to have known, before he became P's agent, of a fraud committed on the revenue officers. The Supreme Court laid down the rule that if the jury believed that A remembered the fraud when he bought the liquor on P's behalf, and if he could have told P, then his knowledge would be P's. The court suggested that if A's knowledge of the fraud had been acquired confidentially as attorney for a former client, such knowledge not being rightfully communicable to P could not be imputed to him. The burden of proving the agent's state of mind and his ability to disclose to his present principal is on the party alleging that the principal had notice (13). Some courts hold absolutely that it is only during the term of the agency that notice to an agent is notice to his principal (14).

§ 135. **Notice to an agent adversely interested is not notice to the principal.** The rule of notice is intended for the protection of third parties who should be able to presume that material facts brought to the agent with whom they are dealing in a given transaction will be communicated to the principal, or at least acted on by the agent with the principal's full permission. If, however, the fact brought to the agent's knowledge is such, or the agent's conduct is such, as to make a reasonable man understand that the agent will not communicate it to the principal—as for example where the agent is acting for himself and adversely to his principal—then notice to the

(13) Constant v. University of Rochester, 111 N. Y. 604.

(14) McCormick v. Joseph, 83 Ala. 401.

agent will not bind the principal. So where A, acting in his own personal interest, sells land to a company of which he as president was purchasing agent with authority to buy, his knowledge that the title is defective is not imputable to his principal, the company (15).

§ 136. **Notice to agents of corporations.** The rule of notice applies to corporations as well as to natural persons, and is very important in this connection since corporations can act only through their agents. If, then, an agent of a company, acting in a transaction within the scope of his authority, obtains any knowledge material to the transaction, the knowledge is thus brought home to the company, whether the agent communicates it to the board of directors or not. Thus where a director of a bank who acted as agent for the bank, as authorized by custom, in discounting a note, knew the note to be fraudulent, the bank was charged with his knowledge. The court said that "if the note is discounted by the bank the mere fact that one director knew of the fraud or illegality will not prevent the bank from recovering. But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge" (16). It will be noted that the knowledge must be acquired by the agent in the course of his employment, and with reference to a transaction in which he himself is engaged. The usual rule as to adverse interest also applies.

§ 137. **Notice to sub-agents.** If either by custom or by

(15) Barnes v. Trenton Gas Co., 27 N. J. Eq. 33.

(16) Innerarity v. Bank, 139 Mass. 332.

express authority an agent has power to appoint sub-agents who will themselves be agents of the principal, notice to these sub-agents is notice to the principal. So insurance companies, whose general agents by custom of business appoint sub-agents to write insurance for them, are liable for the knowledge of these sub-agents. In a case where such a sub-agent, who had written a policy on T's goods, failed to disclose to his company that T was insured in another company, although he had been told so by T, the company was still held chargeable with the information given to its sub-agent, who had been appointed without knowledge of the board of directors by one of the company's general agents (17).

(17) Goode v. Ins. Co., 92 Va. 392.

CHAPTER X.

PRINCIPAL'S RIGHTS AGAINST THIRD PARTIES.

§ 138. **In general.** In his capacity as agent the representative of a principal may deal wrongfully by his principal, and by exceeding or transgressing his authority may give the principal rights against third parties who have dealt with him. The liability of the third party to the principal may be in tort, in quasi contract, or in contract, and may be enforceable in law or in equity.

§ 139. **Rights of principal against third party in tort.** If the agent has wrongfully parted with property entrusted to him by his principal, if for instance he has bartered or pledged property given him to sell, or has transferred it to a third party to pay his own debts, the principal can, with the exceptions noted below, recover it from any person who has it. It does not matter that the third party is innocent in his assumption of possession over the goods he has obtained. He is bound to ascertain the agent's right to dispose of them, and his good faith is insufficient to protect him from the claim of the rightful owner. This is true whether the third party thought the agent from whom he bought was himself the real owner or merely an agent. The principal cannot be divested of his property except by his own act or by operation of law. So where the third party had traded wines for rum with A in good faith, thinking A the owner of the rum

whereas he was only an agent of P with power to sell, P recovered the value of the rum from T, because A had no authority to barter (1). So also where a horse had been delivered to an agent for sale, and he turned it over to a third party in payment of a debt, the owner was allowed to maintain replevin for the horse even against a bona fide purchaser (2).

§ 140. **Same: Exceptions.** If, however, the property consists of currency or negotiable instruments, and T is a bona fide purchaser without notice, or if A has in his possession documentary evidence of title in himself, or if the case falls under the operation of the factors' acts, P cannot recover either the property or damages against the innocent holder for value. Title to negotiable instruments or currency passes by delivery to any bona fide purchaser for value without notice (3). And where the agent has been entrusted by the principal with documentary evidence of title in himself, the principal's conduct in so entrusting his agent with this evidence estops him from disputing the agent's right to pass a good title. So where P has allowed A to stand as registered owner of a vessel, or as the registered holder of a carter's license, he cannot recover from a third party to whom the ship or the truck has been wrongfully disposed of by the agent (4). However, a mere possession of the goods themselves by the agent is not sufficient to estop the principal from asserting title to them in the hands of an innocent pur-

(1) Guerreiro v. Peile, 3 B. & Ald. 616.
(2) Parsons v. Webb, 8 Me. 38.
(3) Ayer v. Tilden, 15 Gray 178.
(4) Calais Co. v. Van Pelt, 2 Black. 372.

chaser who had relied on the agent's possession, since that possession is consistent with various explanations other than ownership. A may have had the goods entrusted to him by the principal for repair, safe-keeping, or sale on commission, and a buyer from A takes them at his own risk (5). The statutory exception in the case of transfer to innocent parties by factors has already been discussed. (See § 116, above.)

§ 141. **Same (continued).** If the third party himself injures or converts the principal's property in the agent's possession, he is of course liable to the principal. So also if he commits a fraud on the agent in the transaction with the agent, for example by fraudulently misrepresenting to him the quantity and quality of a consignment of lumber he was selling the agent for his principal (6). If the third party colludes with the agent to defraud the principal, the third party as well as the agent is liable, and the principal may recover against both. In the case of Salford v. Lever (7), P authorized A to buy coal from him. A conspired with T, a coal dealer, to charge P an extra price for the coal, and turn over the additional profit to A for giving T the contract. P recovered the profit from A, and was also allowed damages against T. If the third party unlawfully prevents the agent from serving the principal, by injuring him or otherwise disabling him from service, the principal has a right of action against the third party. So where T maliciously caused the arrest of A, an engine-driver for the P company, with intent to

(5) See Pickering v. Busk, 15 East 38.

(6) Cushing v. Rice, 46 Me. 303.

(7) Salford v. Lever, (1891) 1 Q. B. 168.

delay P's train, P recovered damages (8). Again, if the third party unlawfully entices the agent from his work, or induces him to break his contract with the principal, the principal has a right of action against the third party. See Torts, §§ 331, 336-37, in Volume II of this work.

§ 142. Rights of principal against third party in quasi contract. If P's agent has paid money to a third party under a mistake of fact, or if P has paid it himself, induced by a mistake of fact on his agent's part, or if the agent has paid money under fraud or duress on the part of the third party—in any of these cases P may recover the money from the third party in an action for money had and received (9).

§ 143. Rights of disclosed principal against third party in contract. When the principal has been named by the agent as the person on whose behalf he is acting, and the agent is within his authority, either previously conferred by appointment or subsequently by ratification, the principal is the only one who can recover from the third party on the contract. In America this is true even when the principal is a resident of a foreign country (10). Even if the agent has embodied his contract in writing and omitted the name of the principal from the written instrument, then, if the contract is not a contract under seal or a negotiable instrument, the principal can show by parol evidence that the contract was made on his be-

(8) St. Johnsbury Ry. Co. v. Hunt, 55 Vt. 570.

(9) Lane v. Boom Co., 62 Mich. 63; Stevenson v. Mortimer, Cowp. 805.

(10) Kirkpatrick v. Stainer, 22 Wend. 244.

half, and can sue the third party on it (11). But if the contract is under seal or a negotiable instrument, only the parties named in the writing can sue on it, and parol evidence cannot be introduced to give the principal a cause of action upon it (12). To make these forms of contract valid for purposes of the principal's suit on them, they should be in his name, and, if sealed, under his seal, and professing to be his deed. A should sign with P's name, thus: "P by A," although "A for P" is also recognized as a good signature if the instrument elsewhere discloses that it was intended to be P's (13).

§ 144. **Same: Rights of undisclosed principal against third party in contract.** When an agent having authority makes a contract with a third party, but does not disclose his agency, there are two cases, which for our present inquiry must be distinguished. The agent may disclose neither the name nor the existence of his principal, or he may, while disclosing the fact that he is acting under a principal, withhold the principal's name.

§ 145. **Same: In general principal can recover.** In general the principal can disclose his relationship to the contract, and recover on it from the third party. Thus where A sold hemlock bark to T under a written contract made in A's own name and not in any way intimating that he was an agent, or that anyone else was interested in the contract, P was able to prove by parol evidence that she was the owner of the bark, and that A made the

(11) Bateman v. Phillips, 15 East 272.

(12) Briggs v. Partridge, 64 N. Y. 357; and see § 126, above.

(13) Mussey v. Scott, 7 Cush. 215; and see Bryson v. Lucas, 84 N. C. 680.

contract as her agent, and on these grounds to recover from T the contract price (14). Since the third party has a right of action on the contract against the undisclosed principal for a breach on the principal's part, it seems just to allow the principal a similar remedy for a breach on the part of the third party.

§ 146. **Exceptions to rule: State of accounts between agent and third party.** If the third party, relying upon the agent's apparent principalship, has acquired a right of set-off against him or has in good faith paid him on the contract, the principal cannot then recover the full amount against the third party. He must allow the set-off or the payment. Thus where P had entrusted tobacco to A to sell, and A sold in his own name to T, and later T, in view of the obligation he had to meet, took from a debtor of his own a bill of exchange accepted by A, T was allowed to set this off against P's claim when sued by P on the contract (15). But it is necessary that T have relied on A's principalship. So if he knows that A is merely an agent, though A has disclosed only the existence and not the name of his principal, he cannot set up a counter obligation or a payment to A. He did not rely on the sole credit of A, and he must recognize P's right as the prime mover in the contract. Even if A is known to T as acting sometimes for himself and sometimes for a principal, as for instance many commission merchants do, selling goods of their own as well as on commission, T cannot then assume that A when dealing with him is

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(14) Huntington v. Knox, 7 Cush. 371.

(15) George v. Clagett, 7 T. R. 359.

contracting for himself. He is bound to inquire as to the character in which A is acting in a particular transaction, and if he fails to do so he cannot be allowed the benefit of a set-off against the undisclosed principal (16).

§ 147. Same: Negotiable paper and sealed instruments. As has been already noted, the law of undisclosed principal has no application to sealed instruments and negotiable papers, and the principal gets no rights on these forms, as he has no liabilities. (See § 126, above).

§ 148. Same: Where agent has expressly represented himself as principal in a written instrument. If the agent has in express terms represented himself as principal in a written instrument, the parol evidence rule will prevent the principal from showing that he is a principal in order to sue on the contract (17). But if the agent is a real principal, though in the instrument he represented himself as the agent of an undisclosed principal, he may later sue as principal himself, since the third party, after all, relied on his credit when he made the contract (18).

§ 149. Same: Where personal reliance is placed in agent. If the contract was expressly made with the agent as principal, and it can be shown, either from the written documents embodying the transaction or from the accompanying negotiations not put in writing, that a special personal trust or confidence was reposed in the agent as principal, e. g., on account of the personal nature of the services contracted for, then the principal cannot get

(16) Baxter v. Sherman, 73 Minn. 434.
(17) Humble v. Hunter, 12 Q. B. 310.
(18) Smaltz v. Avery, 16 Q. B. 655.

rights on the contract. If A in his own name contracted with T to write a book for T's publishing house, P could not later show that A was acting as agent for him and recover on the contract from T. So also where A sold T a yoke of oxen for P, a man with whom T was unwilling to have any dealings, and T, finding that they were P's oxen, refused to take them, P got no rights on the contract of sale (19).

§ 150. Liability of the third party to the principal in equity. In equity the principal is given a right to follow any property of his which has through his agent come into the hands of any other than a bona fide purchaser for value. Thus where an agent has deposited funds of his principal with a bank, in an account opened with "A & Co., agents," if the bank holds claims against A & Co. it cannot on the authority of A charge this account with a debt owed it by A (20).

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(19) Winchester v. Howard, 97 Mass. 303.

(20) Baker v. Bank, 100 N. Y. 31; and see the article on Trusts in Volume VI of this work.

PART III.

THE RELATION AS BETWEEN AGENT AND THIRD PARTY.

CHAPTER XI.

AGENT'S LIABILITY TO THIRD PARTY.

Section 1. Torts.

§ 151. In general agent is liable for torts. The agent or servant in serving his principal may injure third parties. He may do so in obedience to his principal's orders or through his own disobedience, carelessness, or malice. But the fact that he is in the employ of another makes absolutely no difference in his own liability to the third parties for violations of their rights. An agent is no more or less liable personally because of his agency. His duty to third parties not to injure them exists quite apart from the relation he has entered into. But he is not liable for any loss they suffer through him where he owes no duty to them.

§ 152. No liability for non-performance of duty owed solely to principal. As the court said in the case of Delaney v. Rochereau (1): "An agent is not responsible to third parties for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot as agent be subjected to any obligations toward

(1) Delaney v. Rochereau, 34 La. Ann. 1123.

third parties other than those of his principal. These duties are not imposed upon him by law. He has agreed with no one except his principal to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible." An illustration is furnished by Denny v. Manhattan Co. (2). A New York bank acted as agent of a Tennessee bank, and kept a stock transfer book for the latter. T, who had bought shares in the Tennessee bank, applied to the New York bank as transfer agent to transfer the shares into his name, so that he could make a sale of them. The New York bank refused to make the transfer, and T lost his sale. He sued the agent bank, but the court held that he could not recover from it. The bank's refusal was not a breach of any duty owed to T. It had a duty to make the transfer, but that duty arose from its agency for the Tennessee bank. It owed it to its principal and not to T. T's action lay against the principal and not against its agent.

§ 153. **Liability for performance of duty to principal injurious to third party.** If by order of his principal an agent does an act which wrongs a third party, the agent is liable as well as the principal. So where A by P's direction set fire to a prairie whereby T's property was burned, A was held equally liable with P (3). And if in the performance of a duty to the principal, which if properly performed would not injure anyone, the agent executes his commission so improperly as to injure a third party, the agent is liable. Thus where A was directed

(2) 2 Denio 115.

(3) Johnson v. Barber, 10 Ill. 425.

by P to put up a block and tackle in a factory, and he left his work unfinished and the block so negligently suspended that it fell on T and injured him, A was held liable. The court said: "It is doubtless true that if an agent never does anything toward carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons, which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards" (4). So again where A, a house agent, had the water turned on in a business block which he had charge of, without observing the necessary precaution of inspecting the taps to see that they were all shut off, he was held liable to a tenant whose stock was damaged by leakage from an open tap above his store (5). By the better opinion the rule applies in cases where a real estate agent entrusted with the possession and control of vacant premises puts a lessee into possession when he knows or ought to know they are in such disrepair as to be danger-

(4) Osborne v. Morgan, 130 Mass. 102.

(5) Bell v. Josselyn, 3 Gray 309.

ous. If his negligence leads to injury to the one he put in possession he is liable (6).

SECTION 2. CONTRACTS FOR DISCLOSED PRINCIPAL.

§ 154. **Agent generally not liable.** If A, acting under instruction from P, steps into T's shop and asks T to do some work for P, T cannot subsequently elect to hold A responsible on the contract (1). The mere act of ordering does not make the agent liable where he tells the third party his relation to the transaction. That statement is equivalent to a declaration of intention not to be bound personally. But if at the time of making the contract T tells A that he will do the work only if A himself will be responsible and A consents, then A will be personally liable. Whether the contract has been thus made so as to bind A is a question of the intention of the parties (2). In some occupations, however, A's intent to assume personal liability will, by the custom of the business, be presumed in the absence of an express stipulation to the contrary (3).

§ 155. **Written contracts not under seal.** If the contract made by the agent for a disclosed principal is put in writing, its terms usually bind the principal alone. But the agent may fail to embody his disclosure of the principal in the writing, or may in some other way make the contract in apt terms to bind himself personally. The agent is not then allowed so far to contradict the

(6) Baird v. Shipman, 132 Ill. 16, but compare Van Antwerp v. Linton, 89 Hun. 417.

(1) Owen v. Gooch, 2 Esp. 567.

(2) Addison v. Gandassequi, 4 Taunt. 574.

(3) Pike v. Ongley, 18 Q. B. D. 708.

written instrument as to show by parol evidence that the intention was not to bind him. This is held despite the fact that, as we have seen, parol evidence may be introduced, when the principal's name is lacking, to bind the principal also, "for to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done" (4). Even if the agent has signed his name with the affixed word "agent," or has described himself in the body of the instrument as an agent, he is not thereby relieved from liability (5). But if, although he signs the contract with his own name, yet in the instrument he indicates that he is acting for a principal whom he names, as in the phrase: "We have this day sold to you, on account of James Morand & Co., 2,000 cases of oranges," he thereby frees himself from liability (6).

§ 156. **Sealed and negotiable instruments.** If the instrument is under seal, only the parties named in the instrument can be charged on it. So if the agent fails to embody his principal's name in an instrument required by law to be under seal, and does put in his own name, he himself is bound (7). The name of the principal need not appear in the signature if it appears elsewhere so as to allow the court to construe the document as the principal's. If the writing is a negotiable instrument, the person in whose name it is executed is liable on it.

(4) Higgins v. Senior, 8 M. & W. 834.
(5) Brown v. Bradlee, 156 Mass. 28.
(6) Gadd v. Houghton, 1 Exch. Div. 357.
(7) Taft v. Brewster, 9 Johns 334.

So if A has executed it in his own name, he cannot introduce parol evidence to show that the intention of the third party and himself was to make the contract binding on the principal and not on the agent. Thus where an agent made a note promising to pay T £100 and signed it "A, Trustee," he was not allowed to show that he entered into the contract on behalf of a building society. He had made the note in his own name, and the addition "Trustee" was immaterial when the note did not disclose any person for whom he was acting (8). Various jurisdictions, however, modify the rigor of this rule as to negotiable instruments by judicial interpretations so numerous and diverse as to be beyond the scope of this present discussion.

§ 157. **Liability for unauthorized contracts.** The agent may, through innocent mistake or negligence, or with deliberate intention, make with a third party a contract, professedly by authority of the principal, which authority in fact he did not possess. In such a case if the third party entered into the contract in good faith, believing that the agent had the authority, the agent, whether he acted in good faith or not, is liable for the breach of his implied warranty that he did have authority. The doctrine of implied warranty took its form in the case of Collen v. Wright (9). In that case A was a renting agent for P's property, and innocently exceeded his authority by leasing a certain tract to T on terms he had no right to make. T sued P on this lease in equity, and lost.

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(8) Price v. Taylor, 5 H. & N. 540.

(9) Collen v. Wright, 8 E. & B. 647.

A had in the meanwhile died, and T brought suit against A's executors on account of the losses he had suffered through relying on A's lease. The court held that in consideration of T's entering into the main contract with P (i. e., the lease) A had impliedly promised that he had authority to make the main contract on P's behalf, and for his failure to make this promise good he would be liable; and the right of action against him for the breach would survive his death. The amount of damages the third party is allowed in such case is the amount of loss resulting as a net and probable consequence of the breach of contract. So in Collen v. Wright, T recovered, in addition to what he lost through not getting the property he had leased, also the costs of his unsuccessful suit against P. If the misrepresentation of authority is consciously made with the intention to deceive, the injured party has a right of action in tort for wilful deceit (10). If, however, the agent does not deceive the third party, for instance where the third party knows all the facts himself, he cannot recover against the agent. So where an agent signed a contract: "by telegraphic authority of [P], [A], as agent," the court admitted evidence to show that such a signature by business custom was used by agents to disavow any other authority than that of a possibly erroneous telegram (11). So also if A in good faith puts T in possession of all the facts on which A himself relies as constituting his authority, and T, exercising his own judgment on the facts, concludes the con-

(10) Noyes v. Loring, 55 Me. 408.

(11) Lilly v. Smales, (1892) 1 Q. B. 456.

tract with A on that basis, A is not personally liable to T. Thus in the case of Smout v. Ilbery (12), P's wife went into T's butcher shop and said, "My husband is on a voyage to China. I wish to buy meat for the family." T supplied her with meat. Later, news came that prior to the time of the request by his wife P had died, so that his wife's agency had been put an end to. But it was held that the wife was not liable on a warranty of authority, as she had not represented herself as agent, but had merely given the facts on which T had exercised his own independent judgment.

§ 158. **Liability for contracts made on behalf of a non-existent or incompetent principal.** If an agent professes to act for a principal, he impliedly warrants the principal's competence (13). Thus if he makes a contract for a principal who is a married woman, in jurisdictions where she has no contractual capacity, so that the third party could not recover from the principal, the third party would have a right of action against the agent. If he made a contract for an infant where an infant's appointments of agents are held voidable, and the infant disaffirms the contract, the agent will be liable; but the infant must actually disaffirm in order to give the third party a right of action. When an agent professes to have authority from a principal who is in fact not in existence at the time, the agent becomes personally liable. This has been illustrated in the case of promoters professing to contract on behalf of a corporation not yet

(12) Smout v. Ilbery, 10 M. & W. 1.

(13) Hoppe v. Saylor, 53 Mo. App. 4.

organized (14). Another illustration is furnished by the common case of a contract made by an agent on behalf of an unincorporated association, which is not a legal entity. Thus where the captain of a company of volunteers professed to contract on behalf of his company for a rifle fund, he was held personally responsible, as the company was not a competent principal (15). It should, however, be noticed that if he had professed to contract on behalf of the members of his company, and not for the fictitious principal, the company itself, he would not have been liable if in fact he had had actual authority from the members (16).

Section 3. Contracts for Undisclosed Principal.

§ 159. Agent is liable on contracts for undisclosed principal. Where an agent makes a contract for an undisclosed principal, whether the contract is oral or in writing, he is liable on the contract. So where A, who was personally well known to T, but of whose business T knew nothing, bought cattle from T in his own name but in reality for a meat market in which he was an employee, T was allowed to recover from him personally. As the court said: "It would be a monstrous principle that a person buying an article in his own name and on his own credit could screen himself from liability for payment on the ground that he had bought it under a secret understanding that he was the agent of a bankrupt" (17).

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(14) See discussion of Kelner v. Baxter, § 22, above.

(15) Blakely v. Bennecke, 59 Mo. 193.

(16) Pain v. Sample, 158 Pa. 428.

(17) Pierce v. Johnson, 34 Conn. 274.

Even if the agent discloses the existence but not the name of his principal, the third party makes the contract in reliance on him personally. It does not matter that after the contract is made the agent discloses his principal, or even that the third party first sues the principal. He retains his right against the agent until he has pursued a suit to final judgment (18). If, however, at the time of the contract, the third party knows who the agent's principal is, no matter whether he got the information from the agent or from some other source, he does not rely solely on the agent's credit, and the agent is not liable (19).

§ 160. Agent's liability in quasi contract. In general the agent is liable in quasi contract to a third party who has paid him money under a mistake of fact, or under duress, or induced by fraud, or on a consideration which fails. For example, T had paid a premium on his policy to A, the agent of the company in which he was insured. Before A paid over the money to the company, or assumed any liability on account of it, the company failed. T was allowed to recover the money from the agent (20). If, however, the agent has disclosed his principal, and has in good faith paid the money received from the third party over to his principal before notice from the third party, this will relieve him from liability, unless he has been personally guilty of fraud or duress. To illustrate: A insured a ship with T, telling T that he was merely an

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(18) Cobb v. Knapp, 71 N. Y. 348.
(19) Chase v. Debolt, 7 Ill. 371.
(20) Smith v. Binder, 75 Ill. 492.

agent. The ship was lost. A collected on the policy from T, and paid it over in good faith to P, just before T notified him not to do so, on the ground that it had been discovered that the policy was voidable for a concealment. A was held not liable for the money which had passed through his hands (21). But if A had secured the money through his own fraud or duress, or if he had not disclosed his principal, a payment over to the principal would not relieve him from liability (22). Again, if the agent is given money by his principal to pay over to a third party, and A undertakes to the third party to pay him, even without any consideration from the third party for his promise, if later the agent converts the money to his own use he is liable to the third party in an action for money had and received to the third party's use.

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(21) Holland v. Russell, 4 B. & S. 14.

(22) Larkin v. Hapgood, 56 Vt. 597; Smith v. Kelly, 43 Mich. 390.

CHAPTER XII.

THIRD PARTY'S LIABILITY TO AGENT.

§ 161. In tort. A third party is liable to an agent for any actionable wrong done him personally. So where A, an agent, was selling a certain piano, and a rival agent, T, published a libelous advertisement about the pianos A was selling and thus injured A in his business, A was allowed damages in a suit against T (1). In his capacity as agent, the commonest injury an agent suffers is interference with his employment. He can recover against anyone who unjustifiably procures the principal to discharge him, even though he is an agent whose employment is revocable at will. S was an employe at will of the M company. He had a claim on account of injuries against a casualty company, in which the M company was insured. To prevent S's having funds to press his claims, T, the manager of the casualty company, procured the president of the M company to discharge S. Although the M company had a right so to discharge S, still he was able to recover damages from T for his unjustifiable intervention (2). The third party is also liable to the agent for injury to any property of the principal in the agent's possession, or any to which he is as agent entitled to possession. So the captain of a canal boat owned

(1) Weiss v. Whittemore, 28 Mich. 366.

(2) Gibson v. Casualty Co., 232 Ill. 49.

by P may bring trespass against a third party for cutting the tow-rope of the boat (3).

§ 162. **In contract: In general.** Since the agent is merely a representative of the principal in dealings on the principal's behalf, it is only in exceptional cases that he himself has a right of action against the third party on the contract he made with him. But he has in some cases a right to the exclusion of his principal, and in some cases along with his principal, but always for his principal's benefit.

§ 163. **Agent alone can sue on sealed or negotiable instrument made in agent's name.** If the agent makes a contract under seal in his own name, even though for a principal whom he discloses at the time of the contract, the agent alone can sue on the contract (4). But any defense good against the principal will be good against the agent, at least where equitable defenses are allowed. So when in an action by A for rent on an indenture of lease made between A and T, T admitted that the rent was due, but set up as a defense a claim against A's principal, for whose exclusive use and benefit A was suing, the defense was held good (5). Of course when the agent brings the suit, any defense good against him may be set up against him, even though it would not be good against the principal. For example: The T Insurance Co. had insured a ship for A by a policy under seal. A was acting for P, whose name did not appear in the policy. The T Co. had agreed with A that A should take

(3) Moore v. Robinson, 2 B. & Ad. 817.
(4) Briggs v. Partridge, 64 N. Y. 357.
(5) Bliss v. Sneath, 103 Cal. 43.

the credit on their books, in place of money, in partial adjustment of a loss on one of the ships A had insured for P. This agreement was beyond A's authority, and A, acting under P's orders, sued for the actual cash. The court held that although, if P could sue in his own name the company's defense would not be good against him, yet when A sued he must be treated in all respects as the real party in the cause. "The plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself" (6). If the agent is named as payee of the negotiable instrument, he alone can sue on it; and if he has not named his principal in the writing itself, he alone can sue. But since he can give the principal the right to sue in his own name by endorsing the paper over to him, the technical rule is unimportant.

§ 164. **Agent as well as principal may sue when principal is undisclosed.** When an agent makes a contract for an undisclosed principal, the third party binds himself personally to the agent, and so the agent as well as the principal can sue on the contract. Thus where A sold bitumen to T and signed a memorandum as follows: "Sold for account of A, agent, to T, 4,000 cases of bitumen," it was held that A could sue on the contract even though he had described himself as agent. He had not disclosed a principal, and T was bound to him personally (7). Of course the principal has a right, and a paramount right, to sue. The law is well stated in Rhoades v. Blackiston

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(6) Gibson v. Winter, 5 B. & Ad. 96.

(7) Ludwig v. Gillespie, 105 N. Y. 653.

(8): "It is a well established rule of law, that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues it is no ground of defense that the beneficial interest is in another, or that the plaintiff when he recovers will be bound to account to another. . . . . The agent's right is of course subordinate and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired."

§ 165. **Agent as well as principal may sue on a written simple contract made in agent's name.** When the agent has disclosed his principal in a transaction finally embodied in a written contract, but in this contract the agent has failed to embody the principal's name, so that in the instrument the obligation of the third party runs to the agent personally, the agent may sue on it, even though the third party could show that at the time of the contract he knew that the agent was acting for an undisclosed principal (9). A settlement with the principal would, however, be a good defense to an action by the agent in such a case (10).

§ 166. **Agent may sue in his own behalf where he has a special property.** Where the agent has some vested interest or special property in the subject matter of the agency, he may sue in his own name for the protection of

(8) 106 Mass. 334.

(9) Tustin Fruit Association v. Fruit Co., 53 Pac. Rep. 693 (Cal.).

(10) Atkinson v. Cotesworth, 3 B. & C. 647.

this interest, and, at least so far as this interest is concerned, the principal cannot control the suit. Thus in the case of auctioneers and factors, who have a lien on the goods delivered to them by their principal for their commissions and charges, the right to sue the purchaser for the price in their own name lies in the agents, and until their lien is satisfied this right is superior to the principal's (11). When the agent sues a third party on a right arising out of his agency, he may recover the full measure of damages for the infraction (12). To the extent of his own interest in the subject matter he may himself retain the amount recovered. The balance he holds in trust for his principal.

§ 167. **Agent may sue in quasi contract in cases of mistake, etc.** An agent may have paid out money to a third party under circumstances in which it is a violation of his quasi-contractual rights for the third party to retain it: for example, he may have paid it over under a mistake of fact, or owing to the fraud or duress of the third party. Since he must account personally to the principal for the moneys he receives or disburses in the course of his agency, he can recover in such cases in his own name from the third party. Where the captain of a boat was compelled by a customs officer to pay certain fees, later found to be unlawfully collected, the captain was allowed to recover in his own name. The court said: "Where a man pays money by his agent which ought not to be paid, either the agent or the principal

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(11) Minturn v. Main, 7 N. Y. 220.

(12) Treadwell v. Davis, 34 Cal. 601.

may bring an action to recover it back'' (13). But an agent cannot recover in every case of the payment of money under a mistake of fact. For a mistake as to which the third party is innocent, without fault or fraud, and the mistake is solely the agent's, there is no right of recovery. So where A, a steamship company's agent, agreed with T to sell him two tickets to Scotland for $33, and did so, and the latter discovered that he should have charged $42 according to schedule prices, he could not recover the difference from T. The court said: ''There is no claim that the defendant practiced any fraud or imposition in the matter of purchasing tickets. He acted in entire good faith and paid the plaintiff the price asked and agreed upon at the time of the purchase and sale. Why then should he be compelled to make good the agent's mistake in respect to the price? He never agreed to pay $42 for a ticket, and non constat that he would have purchased at that price'' (14).

(13) Little v. Fossett, 34 Me. 545.

(14) Hungerford v. Scott, 37 Wis. 341.

APPENDIX A

QUESTIONS—CONTRACTS

§ 1. What is the difference in the nature of the right that a man has not to be libelled, and his right to recover damages from someone who agrees to sell him some bonds and then refuses to do so?

§ 2. What is the difference in the legal nature of a cash sale and a credit sale?

§ 4. What is the difference in the origin of the rights of the parties where Jones pays Brown $500 believing that Brown is Coe and where Brown give Jones his note for $500?

§ 8. Arnold says to Bates, "I will give you $1,000 if you will marry within the next two years." Bates does so. What kind of a contract is this?

§ 13. Gray wrote to Stone, "I will sell you my two cylinder runabout for $450." Stone knew that Gray recently bought two autos, a two cylinder and a six cylinder, and thought he meant the former. In fact, what Gray meant was a four year old two cylinder car that he had not been recently using and of which Stone knew nothing. May Stone hold Gray to the sale of the new runabout? May Gray compel Stone to take the old runabout?

§ 14. Wilson sent White a letter as follows: "I will give you $5,000 for your house at 10th and X streets," and signed his name. Then he wrote "over" at the bottom of the page and on the other side added: "This is conditional on your taking my place at a valuation of $2,500." White wanted to close the matter up in a hurry, so he simply glanced at the first page and wrote Wilson that he would accept his offer. May White refuse to take Wilson's house as a part payment?

§ 17. Jones made Smith an offer. Smith wrote his acceptance and mailed it. Then he decided to call it off and telegraphed Jones to that effect. Jones got the telegram before he did the letter. May he hold Smith to the contract?

§§ 19, 21. Doe said to Crane, "I will sell you 100 shares of XY stock at $50." Crane said, "I'll give you $45." Doe said nothing, but an hour later sends around a certificate for 100 shares and a bill for $4,500. May he hold Crane?

§ 22. A father wrote to a motor company: "If you want to sell my son a car I'll see that you are paid for it if he doesn't pay you." The company sold the son the car. He told his father that he couldn't have got the car if it had not been for his note. The company said nothing to the father, but later, on the failure of the son to pay, brought suit against the father. May they hold him?

§§ 24, 25. A patent medicine company published an advertisement as follows: "We will pay $500 for any case that is not helped by our celebrated specific." Jones took their medicine and was not helped. May he recover the $500 from the company?

§ 27. Brown and Hill exchanged notes providing that Brown would sell his factory and business for $100,000, "time and terms of payment and method of transfer to be arranged later." Later Brown wished to withdraw. May he do so without rendering himself liable to an action?

§ 31. Arnold said to Bates, "For the next 3 days I will sell you my regular $30 stoves for $18 apiece." Next day Bates came in to buy, but just as he entered the store Arnold said, "I'll have to call that offer of yesterday off." May Bates hold Arnold to his original proposition?

§ 34. Suppose that in the afternoon of the day the offer was made Bates had been told by Doe, Arnold's partner, that Arnold had decided not to sell the stoves at $18, could he have held him?

§ 36. One broker said to another on the corn exchange, "I'll sell you 50,000 bushels of wheat at 80 cents a bushel." An hour later the other broker came back and said he would take the offer. Is there a contract?

§ 38. Dale in New York wired White in San Francisco: "I will give you the position of superintendent at $10,000 a year. Come on at once and arrange details." White came on at once at considerable expense, but when he reached New York, Dale was dead. May he enforce any claim?

§ 43. Hall said to Lewis: "If you will assign to me for three weeks the mortgage that Cornell executed to you 2 years ago I will give you $4,000 for the use of it." Lewis agreed and assigned it. Hall expected by threatening to foreclose the mortgage to compel Cornell to sell the land. Unknown to Hall the mortgage contained a clause providing that Cornell could have 5 years more on it if he desired, so that it was absolutely useless to Hall. May Lewis collect his $4,000 from Hall?

§ 46. Todd agreed to pay Black $1,000 if Black would let Todd vote certain stock that Black owned and would agree not to sell the

products of his mill for less than a certain rate. The latter agreement was illegal. Black agreed to the whole offer. May Black collect the $1,000 from Todd? May Todd vote Black's stock on tendering the $1,000?

§ 47. On what theory is one of several subscribers to a fund held to the payment of his subscription?

§ 49. Abbott subscribed for a set of Dickens' works, the publisher agreeing to deliver one volume a month and Abbott agreeing to pay the price, $25, on the delivery of the last volume. He did not do so and finally the parties signed a statement that "it was mutually agreed that Abbott should have three months from date in which to complete his payments." Three weeks later the publishers sued him for the $25. Has he a defense to the suit?

§ 51. Dole was a night watchman in a factory yard, his watch being every night in the week. An adjacent householder, desirous of having some one about, said to Dole: "If you keep up your duties faithfully I will give you a bonus of $10 a month." Dole did perform faithfully. May he collect the bonus?

§ 52. The husband of a murdered woman, being extremely anxious that the murderer who is being tried shall be convicted, says to the district attorney who is prosecuting the case: "If you will get a conviction in this case I will pay you $500." The district attorney gets a conviction. Is he legally entitled to the $500?

§ 53. Gray had a claim against Todd and was about to sue on it when Todd said that he would pay him $100 to call the matter square. Gray agreed. He now sues to get the $100 and Todd sets up that the original claim was invalid. Is this a defense?

§ 57. The owner of a house was going away for 6 months and asked his neighbor to go over the premises once a week, air them, see that they were kept in good order, etc. The neighbor did so. On the owner's return he promised to pay him $50 for his trouble and the other said that would be satisfactory. Later the first man refused to pay the $50 on the ground that his promise was gratuitous. May he be compelled to pay it?

§ 59. A debtor went through bankruptcy and secured his discharge. Later he voluntarily promised one of his creditors to pay him in full. May the creditor hold him to this promise?

§§ 63, 65. Angus in writing agreed to pay Dalton $500 on his wedding day; opposite his name Angus wrote "seal" and made a scrawl with the pen. There being no consideration may he be held on this promise?

§ 66. Two persons signed a deed whereby they agreed the one

to sell and the other to buy a certain piece of land. A week later the purchaser met the seller and said "Let's call that off," to which the seller agreed. May he afterward hold him?

§ 69. White hired Marsh to work for him for a year. White was insane at the time, though the fact was not known to Marsh. May Marsh hold him to his contract?

§ 72. Would the result in the last case be different if (1) White had an insane belief that a certain person was trying to kill him but was otherwise sane; (2) was insane at intervals but lucid at other times?

§ 73. May a man be held to a contract made while intoxicated?

§ 79. An executor of an estate bought on credit some flowers for the funeral. His promise to pay for them was not in writing. May it be enforced against him?

§ 82. Is an agreement to sell standing grain one that is covered by the statute that all contracts for the sale of any interest in land must be in writing?

§ 84. In consideration of a promise by Barnes to repay the loan, Murphy agreed to advance Barnes $50 a month until Barnes' income from his own labors reached $100 a month. The agreement was not in writing. May it be enforced against Murphy?

§§ 87, 88. "For value received we promise to pay William White or order, $500 on demand."

(Signed) Arthur Brown.
Charles Darwin.
Ernest Fish.

Suppose White releases Brown from this note what effect will it have on Darwin and Fish?

How may he practically release Brown without releasing the other two?

How should the note be drawn so that he may hold each one separately liable?

§ 89. Suppose Brown dies, may White sue Brown's executor with Darwin and Fish?

§ 91. Gray and Maine made a contract whereby Gray agreed within six months to appoint Maine as his sales agent in a certain town or else to make him assistant superintendent of his factory. When the six months were up Maine wrote saying he preferred the agency. Gray wrote back that he could not have that but could have the assistant superintendentship. May Maine maintain an action against Gray for breach of contract?

§ 93. A father whose daughter was about to be married paid $100 to a jeweler who agreed to make a brooch and mail it to the daughter. He refused to do so. May the daughter sue?

§ 94. An advertising agency agreed with a manufacturer to run an advertisement for him for three months in a certain magazine. They did not do so. May the magazine sue for what it would have made on the advertising?

§ 96. Lord owed Dale $500. Chase agreed with Lord to pay the debt to Dale. Later by mutual agreement between Lord and Chase this agreement was rescinded. May Dale still sue on it?

§ 97. If Dale sues Chase on the above promise, may Chase set up the defense that his promise was induced by Lord's fraudulent misrepresentation?

§ 98. Would it be a defense for Chase to the action by Dale that Dale had already begun suit against Lord on the original claim for $500?

§ 103. Can an action for breach of contract to marry be legally assigned to a third person?

§ 109. Bryan had a claim of $500 against Green which he assigned to Fox. Green thereafter paid Bryan. May Fox now collect from Green?

§ 110. Suppose Bryan, after assigning his claim against Green to Dale had then assigned it to Low and Low had at once gone to Green and showed him the assignment and collected the claim. What are Dale's rights (1) against Green; (2) against Low?

§ 116. What is the function of a court in constructing a contract?

§§ 123 to 127. Fort agreed to pay Hill $1,000 for an auto and Hill in return promised to deliver it to him and to keep it in repair for one year. When must Fort pay his $1,000; on delivery or at the end of the year of repairs?

What would be the result if there was a clause in the contract that Fort was to try the auto first for a month?

§ 128. Suppose the contract had a clause that the auto was to be satisfactory to Fort and it was not satisfactory to Fort, but he was unreasonable. Could Hill collect the price? Suppose Fort told Hill it was not satisfactory but admitted to others that it was. Could Hill collect?

§ 130. Thomas agreed to sell and deliver to White in Chicago 10,000 bushels of wheat at 60 cents a bushel. He delivered 9,800 bushels and White refused to take or pay for them. May Thomas recover on the contract and if so, how much?

§ 131. Would it be different, if, in the last question White had agreed to pay a lump sum for the 10,000 bushels?

§§ 132, 133. Spates contracted to deliver 100,000 bricks to Lyman in installments of 10,000 each on the first day of 10 successive months, each installment to be paid for as delivered. Spates delivered the first two installments, and delivered the third installment ten days late. Lyman refused to accept it and called the contract off. Is he justified in so doing? No. Jus

§ 140. Gray hired Swift as a gardner for a year at $30 a month. Later they agreed that Swift's pay should be $25 a month. It turns out that at the time Swift made the second contract he was so intoxicated that he did not know what he was doing. May he still collect $30 a month or is Gray freed from all liability on the contract?

§ 147. Parker owed White $150 for a horse. White dunned him and Parker gave him his note payable 30 days from date. The note is not paid. May White sue on the original debt or only on the note?

§ 149. Suppose in the last case Parker sent White his check for $125 saying that it was for payment in full and White cashed it. Could he then collect the other $25?

§ 154. Murphy is playing poker and Jones loans him $100 to buy chips. May Jones compel Murphy to repay the loan?

§ 157. A liquor dealer sold whiskey to a druggist who was doing business in a no-license town and to help the druggist in selling it, put it in bottles labelled "Root Bitters." May he collect from the druggist the price of the liquor?

§ 160. The proprietor of a general merchandise store in a country town sold it out to Yoe and agreed not to open a similar store anywhere in that county or any adjacent county. Is the agreement binding?

§ 166. Smith, wishing to annoy Chase, offered Dale to pay all his expenses and give him $500 if he would sue Chase for libel. Dale did so. May he collect his expenses and $500 from Smith?

§ 169. Allen was injured by a railroad company. His doctor advised him to sue and Allen said he would give him $10 if he would pick out a good lawyer and get him to bring action. The doctor went to Smart, a lawyer, and offered him the case if he would give him (the doctor) $50, to which the lawyer agreed. The patient found this out and refused to pay the doctor the $10. Was he justified in so doing?

§§ 172, 173. An automobile manufacturer hired Wright to run

his car in a race and offered him $1,000 if he won the race and $1,500 if he also succeeded in disabling the driver of a rival car. Wright did both. May he recover the $1,500, or any part thereof?

§ 178. Suppose in the above case Wright's mechanic was to be paid $25 for the race and during it Wright told him to do something that in fact, without the knowledge of the mechanic, contributed to the disabling of the rival driver. May the mechanic recover the $25?

§ 185. Nolan contracted to drive a well for Evans to the depth of 300 feet. At a depth of 150 feet an impassable ledge of rock was encountered. May Evans recover from Nolan for breach of contract?

§ 188. Gould contracted to raise and sell to Hale 1,000 bushels of corn. Before the corn which Gould had planted was ready for harvesting, it was wholly destroyed by a cyclone. May Hale recover from Gould for breach of contract?

§ 197. John Raymond wrote to Siegel asking him to ship him on credit certain goods. There was a well known merchant in the town by the name of John Raymond and Siegel thought he was the one who had written the letter and shipped the goods in that belief. In fact it was another man by the same name. May Siegel rescind the contract?

§ 200. Fox was negotiating for a typewriter with Pierce, who told him that the margin of profit was smaller on that machine than on any other in the market. Such was not the case. May Fox rescind the contract after he has entered into it?

§ 203. Suppose Pierce had told Fox that the mere fact that the company made the machine imposed on the company an obligation to keep it in repair for two years after sale and Fox had relied on that statement in buying the machine, could he rescind the contract on discovering its falsity?

APPENDIX B

QUESTIONS—QUASI-CONTRACTS

§ 1. What is the difference between an express contract and an implied contract?

§ 2. What is the difference between a contract implied in fact and the so-called "contract implied in law?"

§ 3. Jones goes up to a news-stand and picks up and keeps a paper, saying nothing. Is his obligation to pay for it contractual or quasi-contractual?

§ 5. Smith breaks Dodd's window, thereby committing a tort against Dodd for which Dodd sues and gets a judgment for $10. What is the nature of Smith's obligation to pay the $10?

§ 6. A statute provides that the school physician shall vaccinate every child attending the public schools and may charge 50 cents a child for so doing. Is his right to recover the 50 cents contractual or quasi-contractual?

§ 10. If a thief stole property and (1) sold it for more than it was worth; (2) sold it for less than it was worth, what would be the best way to sue him in each case?

§ 11. Finch stole a horse from Dale in 1900. He kept it until 1905 and then sold it to Scott. The Statute of Limitations provides that all actions must be brought within 7 years from the time they accrued. Suppose Dale does nothing until 1908, is there any action that he can then bring?

Suppose the Statute of Limitations was 4 years, could he bring any action?

§ 12. A broker stole certain bonds belonging to Curtis and sold them for $10,000. The sale was originally cash, but the purchaser being short of funds, the broker took his note. May Curtis maintain a quasi-contractual action against the broker?

§§ 13, 14, 15. If the broker in the above case had simply kept the bonds for himself, could Curtis have maintained a quasi-contractual action for goods sold and delivered?

§ 16. Gould took Barnes' horse one afternoon and so badly lamed him that he was worth only $50 where before he had been worth $100. A horse could be hired for the afternoon for $3. How great a quasi-contractual claim has Brown against Gould?

§§ 18, 19. Allen watered his cattle at Ball's spring for 6 days. The damage to the soil was $5, but water at that time was scarce

and if Allen had watered elsewhere he would have had to pay $5 a day, and to drive his cattle there at a cost of $2 a day. How much may Ball recover from Allen in an action based on quasi-contract?

§ 23. Henry and Martha Jones believe that they are legally married when in fact Henry has another wife living. May Martha on separating recover the value of her services as housekeeper?

§ 24. White falsely represented to Todd, a wholesale dealer, that he was a personal friend of Todd's brother Charles and was a large retail dealer. In consequence of these misrepresentations, Todd sold goods to White for $100, the regular price of which was $200. Immediately after the sale and before payment, Todd discovered his mistake. He then brought an action against White for goods bargained and sold, and claimed $200. May he get it?

§ 25. When does a person who has the option to bring an action either of tort or assumpsit, and has brought one, lose the right to bring the other?

§ 28. Hale found certain property belonging to Green. The latter identified it and Hale told him he could have it back on paying the costs of advertising. Green agreed and came next day to get the goods, when Hale demanded $10 more. Green had to have the goods, so he paid it. May he recover the amount from Hale?

§ 29. Dale was about to leave Chicago to take a boat from New York. Barnes had a groundless claim against him, but had him arrested a little before train time on the ground that he was an absconding debtor. Dale paid the money to get away. May he recover?

§ 30. Suppose in the last case a hurried judgment had been obtained by Barnes against Dale and Dale had paid that judgment, could he have recovered the money so paid?

§ 34. Alphonse, Jones' chauffeur, was speeding in violation of Jones' orders. While so doing he injured Young, who sued Jones and recovered from him. May Jones recover from the chauffeur?

§ 35. Dill took out a fire insurance policy of $5,000 in the X Company and another for the same amount in the Y Company. He had a $3,000 loss and recovered the whole amount from the X Company. May the X Company recover $1,500 from the Y Company?

§ 37. White's house caught fire while he was away. Frear, his neighbor, fearing that the fire would entirely destroy the house, put it out as an act of kindness. May he recover from White for his services?

§ 39. Lord makes a mistake as to the boundary between his land and his neighbor's and builds a chicken coop on his neighbor's land.

When ejected from the land may he recover for the value of the improvement?

§ 42. Fales executed a note to Hill to pay $500 "with legal interest." Both thought the legal rate of interest was 8 per cent. and Fales paid on that basis; in fact it was 6 per cent. May Fales recover the difference?

§ 44. Thayer agreed to deliver 1,000 pounds of ice a day to Gould's restaurant at the rate of $2.50 a day. Thayer later got the erroneous idea that he had agreed to deliver 1,200 pounds and did so, charging $2.50 a day. May he, on discovering his mistake, recover the difference?

§ 49. An author agreed to furnish an editor with 3 short stories, a long story and 4 poems for $1,000. After furnishing one short story and a poem he died. May his executor recover in quasi-contract for the contributions furnished?

§ 50. Suppose in the last case the contract was oral and was one that was not to be performed within a year and so within the statutes of Frauds. If the author had simply refused to complete his contract after performing part, could he have recovered in quasi-contract for what he had done?

§ 52. Abbot agreed to buy Scott's store and stock for $10,000 and paid him for it. Scott then refused to complete the sale and sold it to Chase for $8,000. The store and stock were not worth over $7,500. How much may Abbot recover from Scott and in what form of action?

§ 53. An opera singer agreed to sing for Hill two years for $5,000 and Hill gave him an advance of $1,500. Before the time began the singer's throat was paralyzed so that he could not carry out the contract. May Hill recover the $1,500?

§ 54. Suppose in the last case the singer had duly completed his contract and then sought to recover from Hill the balance of $3,500 and Hill had set up the statute of Frauds. What remedy would the singer have?

§ 55. Ray agreed to sell his factory to a trust in violation of a statute forbidding such sales. He was paid $1,000 on account and then refused to turn over the property. May the purchaser recover the $1,000?

§ 58. A wife goes to a store and orders a barrel of flour, a dress and a diamond bracelet and has them charged to her husband. Under what circumstances would he be liable in each case for (1) the agreed on price, (2) the reasonable value of the articles?

APPENDIX C

QUESTIONS—AGENCY

§ 2. What is the difference between the relation of principal and agent, and master and servant?

§ 5. May a person legally appoint an agent to kill a third person for him?

§ 8. Payne, an infant, gave Allen a power of attorney to sell Payne's land. Allen, in accordance with the terms of the power of attorney, agrees to sell it to Todd. Payne subsequently refuses to convey the land to Todd. May Todd sue Payne?

§ 13. Ray, Jones and Smith and 30 others organized an informal shooting club, called the South Shore Gun Club. They held a meeting at which two-thirds of the members were present and by a majority but not unanimous vote, authorized Ray to buy 300 decoys. He did so. Subsequently the seller sued the club for the price of the decoys. What members of the club are liable?

§ 19. Hale wanted to buy an auto. Jones, his friend, heard of one for sale by Lane. He went to Lane and said he wanted an option on it for Hale. Lane said he could have an option till 12 o'clock. Jones could not find Hale to get his authorization, but at 12 he telephoned Lane that Hale would take it. At 3 that afternoon Jones saw Hale and told him what he had done and Hale ratified it. May Hale enforce the contract of sale against Lane?

§ 26. In the above case, if Lane had found out at 12:30 that Hale had not really authorized Jones to buy the auto, could he have rescinded the contract by notifying Jones?

§ 31. Lord and Dall were in the office of Fales. Dall was trying to borrow $1,000 from Fales and said to him, "Lord has authorized me to pledge his stock to secure the loan." Lord said nothing and Fales advanced the money to Dall. May Fales compel Lord to pledge the stock?

§ 34. White rang up Todd on the 'phone and told him to go down to Dale's office and there sign a deed for White. Todd did so. Does the signature bind White?

§ 40. Luce appointed Field his agent to sell a patented article within a certain district. He subsequently also appointed Barnes his agent for the same purpose in the same district. Has Field any cause of action against Luce?

§ 44. Green listed his house for sale in Olsen's real estate agency.

Shortly thereafter Green died, but Olsen was not notified of this fact and later sold the place to Young. What are Young's rights and against whom?

§ 45. Suppose Green had married after listing the house with Olsen. Would that have affected Olsen's power?

§ 47. Suppose that Green had been indebted to Olsen in $5,000 for money advanced by Olsen to buy the house and that Green had listed the house with Olsen to sell it and to get back his $5,000. What would have been the effect of Green's death on Olsen's power?

§ 48. Fales appointed Dart his agent for ten years to attend to the leasing of a house of Fales. After three years the house was condemned by a railroad and torn down to make room for a station. Dart had been making $50 a year in commissions. What are his rights against Fales?

§ 49. Penn wrote to Allen and told him to buy some goods for Penn and have them shipped to him. Allen gave the wrong shipping directions and was put to considerable expense on that account before the goods finally reached Penn. May he recover from Penn for these expenses?

§ 54. An employee works in a factory cutting glass and his lungs are gradually injured by the dust from the ground glass. May he recover for this injury from the employer?

May he do so if it can be shown that there is a suction apparatus on the market that can be bought for a reasonable sum and fitted over the grinding wheel so as to draw the dust away from the workman?

What would be his rights if the master had supplied such a suction apparatus, but the employee had not used it because he thought it interfered with his work?

§ 55. Suppose a belt in a factory wore through and tore off and killed a workman, would the employer be liable (1) if he had been told of the fact and had not supplied a new belt; (2) if he had kept a supply of belts on hand and told the workman to put on a new one whenever the old ones wore out?

§ 60. An employer hired a superintendent, being careful to choose a man of good reputation. The superintendent became intoxicated and allowed some defective machinery to be installed, as a result of which an employee was killed. Is the employer liable?

§ 63. An apprentice on his first day of work was set to work on a defective machine which injured him. Had he assumed the risk so as to exonerate the employer?

§ 65. White and Young are working together pitching hay on a

wagon, both being employed by Doane. White is injured by Young's negligence. May White recover from Doane?

§ 67. Suppose in the last case White had been injured because Young's pitchfork was defective and Young had had the duty of picking out and allotting the pitchforks to the men every morning. Would White have a cause of action against Doane?

§ 69. Would a telephone exchange operator be able to recover against the telephone company if he were injured by a shock caused by the negligence of a lineman in insulating some feed wires in the dynamo room?

§ 72. Lear was an employee of a steamship company and was employed in unloading a vessel. He was injured by the negligence of a gang of painters who were also employed by the company in painting the vessel. Is Lear barred by the fellow servant rule from recovery against the company?

§ 75. Gray on the way to town was asked by Luce to buy some medicine for Luce's wife. Gray said he would, but did not do so. Is he liable to Luce?

§ 84. Scott hired Thorpe as his lawyer to attend to a collection. Thorpe was busy and turned the case over to Coke, another lawyer. Has Scott a cause of action against Thorpe?

§ 85. Suppose that Thorpe had attended to the collection of the claim himself and when the matter had been adjusted had sent his office boy to deliver the receipted bill to the debtor. Would this be a violation of his duty as agent?

§ 91. Hicks, a clerk in Field's store, saw a sneak thief escaping with some goods and ran after him to arrest him. Finding that he could not catch him he threw a stone to disable him, which hit Todd, a passerby, and put out his eye. Is Field responsible for the injury to Todd?

§ 92. Suppose the clerk in the last case got into an altercation with a customer and to compel him to pay had knocked him down and beaten him. Would Field be liable to the customer for the assault?

§ 93. Suppose this clerk was particularly anxious to make the sale in order to win a prize given to the clerk making the largest number of sales and for that reason assaulted the customer as mentioned before. Would Field be liable?

§ 97. Dill, a clerk of the XY Company, who had charge of the certificates of stock, duly signed, and which required only to be filled out, fraudulently issued one for 100 shares to White, who sold it to Scott, who bought it in good faith, White and Dill keeping the

money. Is Scott's redress against the company or only against Dill?

§ 99. Cox hires a well-digging company to drill a well for him; during the drilling the drill is broken by the negligence of the operator and Yates is injured. May Yates hold Cox?

§ 100. A committee of Dill, Gray and Adams were gathering flowers for a church festival. Murphy lent his automobile and chauffeur to Dill for the day. While bringing the flowers to the church the chauffeur negligently ran down and injured Thayer. Who is responsible therefor, Dill or Murphy?

§ 104. A statute forbids, under penalty of fine, the sale of adulterated milk. A servant of a milkman sells milk that is adulterated. Is the milkman responsible?

§ 110. Hanks owns a flat building in Chicago and puts it in the hands of Allen, a real estate agent. It is the usual course of business to repair the flat for the tenant, but Hanks told Allen not to do so. Allen leased a flat to a tenant and agreed to repair it for him. Is Hanks bound by this agreement?

§ 113. Has a general sales agent power to takes notes in payment?

Has a real estate agent the power to give a warranty deed?

§ 114. Has a purchasing agent power to buy on credit? Has he power to agree that the goods shall be shipped by some particular route?

§ 116. Has a factor power to pledge goods entrusted to him for sale?

§ 117. What is the difference in the powers of a factor and a broker?

§ 119. Has an attorney at law power to let his client's case stand over to the next term of court?

§ 120. Yates had for several years acted as the agent of a company selling farm machinery and had sold several pieces of machinery to Tidd, sometimes taking cash and sometimes Tidd's note. The company finally sent out instructions to all agents to sell only for cash. Thereafter Yates sold Tidd a cultivator and took his note. The company demanded either cash or a return of the cultivator. May they compel Tidd to do the one or the other?

§ 122. Suppose in the last case that Yates had told Tidd he was authorized on behalf of the company to buy a horse that Tidd had and offered him $150 therefor, which Tidd accepted, believing that Yates had the power so to do. Could Tidd hold the company on this contract?

§ 123. Suppose that in the last case the company had given Yates

several blank checks duly signed by the company with which to pay his travelling expenses and he had filled out one of these and given it to Tidd for the horse. Could Tidd collect it against the company?

§ 125. Fales was running a roller-skating rink in his own name, but really as an agent of Olsen. Olsen had instructed him to spend no money except what was necessary for the purchase of roller skates. Fales hired Murphy as janitor of the rink. Fales later absconded without paying Murphy, who on discovering Olsen's connection with the rink sued him for his wages. May he recover?

§ 126. Suppose in the last case that Fales had given Murphy a note for $150 signed by Fales in his own name, could Murphy recover from Olsen on that note?

§ 127. Brown bought land from French, nominally for himself, really for Lord, who was not mentioned. Lord gave the purchase price to Brown, who did not pay French. Thereafter French discovered that Lord was really the purchaser and sued him for the price. May he recover from Lord?

§ 128. Suppose French, in the last case, had first tried to collect by suing Brown; could he thereafter, when he discovered Lord's connection with the case, dismiss the suit against Brown and bring suit against Lord?

Could he do so if he had already known of Lord's connection before bringing his suit against Brown?

§ 131. An automobile driven by William, Payne's chauffeur, ran into Holt. Just as the auto stopped William said: "I struck him because the brake was out of order and wouldn't work properly." Can this statement be used as an admission against Payne in an action by Holt for injury caused by the collision?

§ 133. Hicks was the meter inspector of a gas and electric company. He was reading the meter in Soule's house when Soule said to him: "The electric lights in my office downtown aren't working and I sha'nt pay for the rental of them until they are put in repair." Is this sufficient notice to bind the company?

§ 140. White, a brewer, put Maine in charge of a saloon. Maine sold the glassware, cash register, etc., to Hull, who thought that Maine was the owner and paid him cash therefor. May Hull retain the property as against White?

§ 141. Finch sent Cox to buy a piece of land from Young. Thomas, who wanted to secure the land for himself, kidnapped Cox and detained him until he (Thomas) got the land from Young. Has Finch a cause of action against Thomas?

§ 143. Fox and White made a contract in writing whereby White agreed to sell Fox a certain piece of land. The contract was signed by White and Fox. May Lynch, Fox's principal, sue upon the contract in his own name if Fox during the negotiations had told White that he was acting for another?

§ 148. Would it make any difference in the last case if the agent had expressly stated in the contract that he was acting on his own behalf and not as agent?

§ 152. Peters had a store in Chicago and had agents in various country towns to solicit and forward orders to him. Tidd asked Abbot, one of these agents, to send in an order for certain articles that Peters controlled the sale of. Abbot refused to do so, causing Tidd serious loss. Has Tidd a right of action against Abbot?

§ 153. Thayer, the owner of a paper, ordered Allen, the editor, to insert a libelous statement about White. Allen did so. May White sue Allen for the libel?

§ 155. Marx and Fales signed the following instrument:

"Fales agrees to sell and Marx to buy 10,000 bushels of wheat at 60 cents a bushel.

(Signed) "ALBERT FALES,
"GEORGE MARX, Agent."

May Fales hold Marx on this contract if it appears that Marx was really acting for Houston as principal?

§ 157. Lynch said to Mott: "Gay has asked me to buy for him a perfectly sound horse. I can see that your horse is not sound, but I think he'll do and I will take him for Gay," and they made the sale at $150. Gay refused to take the horse. Has Mott a cause of action against Lynch?

§ 158. Yoe agreed to buy from Luce 1,000 acres of land for the Redlands Improvement Corporation as purchaser, Yoe stating that he was only an agent. There was no such corporation. May Luce hold Yoe?

§ 159. Lane goes to White and says, "I will give you $5,000 for your land. You understand I am not acting for myself, but for a principal, although I am not at liberty to give his name." White accepts the offer. May he hold Lane personally liable on the contract?

May he do so if he found out from another source that Lane was really acting for Peterson?

§ 164. On the facts stated in the last question, if White refuses to carry out the contract, may Lane maintain an action against him?